Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

BERTHA L. PATE,

Petitioner,

v.

SERVICE MERCHANDISE CO., INC., MICHAEL THOMAS, MANAGER, LISA DUNCAN AND VELMA WILSON,

Respondents.

On Petition For Writ Of Certiorari To The Tennessee Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PRIVATE/NON-MEDIA DEFENDANTS ARE AFFORDED FIRST AMENDMENT PROTECTIONS REQUIRING THE PLAINTIFF IN A DEFAMATION SUIT TO SHOW FAULT ON THE PART OF THE DEFENDANTS ASCERTAINING THE TRUTH OR FALSITY OF THE DEFAMATORY STATEMENT WHEN THE PLAINTIFF IS NOT A PUBLIC FIGURE AND THE PUBLICATION IS NOT A MATTER OF PUBLIC CONCERN?

II. WHETHER THE COURT OF APPEALS OF TENNESSEE ERRED IN AFFORDING A PUBLIC INTEREST PRIVILEGE TO A COMMUNICATION WITH A PRIVATE INDIVIDUAL NOT ACTING IN CONCERT WITH THE POLICE AND IN THE PRESENCE OF UNCONCERNED THIRD PARTIES?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bertha L. Pate respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the Court of Appeals of Tennessee, dated September 26, 1996 and the Order of the Court of Appeals of Tennessee, dated October 23, 1996 denying appellant's petition to rehear and the Order of the Tennessee Supreme Court, dated March 17, 1997 denying permission to appeal.

OPINIONS BELOW

The Supreme Court of Tennessee, *per curiam*, on March 17, 1997 denied Petitioner's request for permission to appeal the Order of the Court of Appeals of Tennessee denying Petitioner's petition to rehear on October 23, 1996 and the Judgment and Opinion of the Court of Appeals of Tennessee issued on September 26, 1996 and published at 1996 WL 544397 (Tenn.App.).

JURISDICTION

The Order of the Tennessee Supreme Court was entered on March 17, 1997. The jurisdiction of this Court is invoked under U.S. Constitution, Article III, § 2 cl. 1 which provides that the judicial power of the United States Supreme Court "shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . . " and 28 USC, § 1257(a) which

provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . [of] the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article III, § 2, clause 1.

The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . . "

28 USC, § 1257.

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

U.S. Constitution Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

The Petitioner Bertha L. Pate filed this action after she was terminated from her position as a nurse manager by St. Francis Hospital. The Petitioner was fired after she was suspected of stealing a co-employee's (Laverne Luton's) credit card and using the credit card to purchase two video cassette recorders (VCRs) from Defendant/Respondent Service Merchandise.

Luton's credit card was stolen on January 2, 1991 while she was working at the hospital. Luton discovered later that day that her credit card had been stolen and she reported the incident to the security department at St. Francis Hospital. The chief safety officer at St. Francis, Richard A. Hunt, reported the theft to Union Planters National Bank. Luton filed a report of the incident with the Memphis Police Department.

On January 11, 1991, Luton received her credit card statement from Union Planters and discovered a charge at Service Merchandise which she did not make. She asked

Rita Schroeder, the President of St. Francis Hospital, to accompany her to Service Merchandise in an attempt to determine what had been charged to the card and to determine the identity of the thief. When Luton and Schroeder arrived at Service Merchandise, they were informed by store management that the items charged to the card could not be determined without the credit card receipt, but with the help of Michael Thomas, the assistant manager of Service Merchandise, Luton eventually discovered that two VCRs were purchased using her credit card.

Luton suspected the Petitioner of the theft based upon a conversation in which she told the Petitioner about the theft, and the Petitioner did not express concern or surprise. Luton further believed that the Petitioner was the thief because she felt like God was telling her that the Petitioner was responsible for the theft.

Based upon her suspicions of the Petitioner, Luton obtained photographs of the Petitioner from Robert Halford, the Director of Human Resources at St. Francis Hospital, and, along with Schroeder returned to Service Merchandise. Upon arriving, Luton and Schroeder were escorted to Lisa Duncan and Velma Wilson, the two clerks who were present when the VCRs were purchased. Thomas had previously been informed that Luton and Schroeder were at the store regarding a fraudulent credit card purchase. Without reporting the incident to the unit manager or the district loss prevention manager, Thomas decided to cooperate with the investigation. However, the Service Merchandise policy manual states, "All known or suspected credit card fraud is reported to the appropriate District Loss Prevention Manager by the Unit Manager."

In addition, it is standard Service Merchandise policy not to talk with the general public regarding credit card fraud, but only to talk with the local police.

Luton presented the Defendant clerks, Velma Wilson and Lisa Duncan, with a highly suggestive and tainted photographic line-up consisting of four pictures. Three of the photographs were pictures of white females, and one of the pictures was of a black female, the Petitioner. Luton first showed the four photographs to Wilson, whereupon she picked up the picture of the Petitioner, took it to the other clerk, Lisa Duncan, and asked her if she remembered the person in the photograph. Duncan then proceeded to the counter to view the other three pictures of the white females. Both clerks identified the Petitioner as the individual who purchased the VCRs on January 2, 1991, but admitted that the person in the photograph had a different hairstyle. The first defamatory statement by each clerk was the oral statement identifying the Petitioner.

Upon returning to the hospital, Luton and Schroeder informed the St. Francis Hospital security department about the identification of the Petitioner, and the security department commenced its own investigation. Lt. Richard A. Hunt and Sgt. Herbert David McKee were placed in charge of the investigation and constructed their own photo line-up which was also highly suggestive. While this photo spread contained pictures of five black women, the photograph of the Petitioner was a blown-up version of the picture that Luton used, was much larger than the other four, and depicted the Petitioner in her nursing uniform while the other photographs presented front and

side views of black women in street clothes bearing Shelby County Criminal Justice Complex jail insignia.

Hunt and McKee took their photo identification spread to Service Merchandise to conduct a second identification procedure. Once again, Thomas violated Service Merchandise's company policy, which prohibited him from speaking to anyone other than the local police, by authorizing McKee and Hunt to present their photo line-up to the clerks, Wilson and Duncan. After viewing the photographic line-up, the clerks noted that the Petitioner's photograph was outstanding and different from the other pictures in the spread. The clerks identified the blown-up version of Petitioner's picture and then executed defamatory written statements identifying the Petitioner as the person who purchased the two VCRs with Luton's credit card. Specifically, the libelous statements are as follows: "I Velma Wilson pick out picture #3 who I sold 2 VCRs to her and a black man;" "I, Lisa R. Duncan, do remember seeing the person on photo number 3 in Services Merchandise. I was not the actual person who rang up the transaction, but I remember the customer."

On March 14, 1991, over two months later, the Petitioner was advised by Halford, who was acting for St. Francis, that she needed to prove her whereabouts on January 2, 1991, between the hours of 2:00 and 3:00 p.m. (The time during which the credit card was stolen from the hospital). Petitioner Bertha L. Pate requested a face to face meeting with the clerks at Service Merchandise who had allegedly identified her, which request was refused. Nevertheless, after suspending the Petitioner, on March 18, 1991, St. Francis officially terminated the Petitioner

because she had been identified as a thief by the Defendant clerks and could not specifically verify her whereabouts at the time of the theft.

Petitioner's Amended Complaint alleges that Defendant Service Merchandise and its employees, Defendants Thomas, Wilson, and Duncan, were negligent in making the identification of Petitioner, Bertha Pate. The Complaint further avers that Service Merchandise negligently violated its own policy by allowing its employees to talk to personnel of St. Francis Hospital's security in conducting its investigation concerning the stolen property. The Complaint avers that these Defendants maliciously or negligently identified Petitioner as the person who purchased the VCRs on a stolen credit card. Defendants' Answer joins issue on the material allegations of the Complaint and denies that there was any negligent or malicious identification and denies that there were any slanderous or libelous statements made concerning Petitioner. The Answer avers that the Defendants acted in good faith and that their communications were made in a privileged context by cooperating in an investigation of possible credit card theft.

The trial court granted summary judgment for the Defendants stating that there was no statement, oral or written, that constituted defamation of the Petitioner, either libel or slander, as a matter of law; and that there was no act of commission or omission which constituted negligence as a matter of law.

REASONS FOR GRANTING THE WRIT

I. PRIVATE/NON-MEDIA DEFENDANTS ARE NOT AFFORDED FIRST AMENDMENT PROTECTIONS REQUIRING THE PLAINTIFF IN A DEFAMATION SUIT TO SHOW FAULT ON THE PART OF THE DEFENDANTS IN ASCERTAINING THE TRUTH OR FALSITY OF THE DEFAMATORY STATEMENT WHEN THE PLAINTIFF IS NOT A PUBLIC FIGURE AND THE PUBLICATION IS NOT A MATTER OF PUBLIC CONCERN.

In the September 26, 1996 opinion written by the Court of Appeals of Tennessee for the Western Section, the court afforded the protections of the First Amendment to a statement the court ruled was libelous in a case which undisputedly concerns a **private/non-media defendant, a private figure plaintiff** and a **statement of purely private concern.** The court, ironically, found the reasoning for its decision to apply the constitutional privilege to case at hand in other appellate decisions that involved: (1) **media-defendants;** (2) plaintiffs who were **public figures or public officials**; and, (3) speech which concerned **issues of widespread, public debate.** After failing to find any authority in Tennessee that afforded constitutional protections to defamatory speech under similar facts, the Court of Appeals of Tennessee then failed to cite any federal authority to support the court's analysis; thus, the Court of Appeals of Tennessee misapplied the applicable federal law which provides that First Amendment protections are not applicable under the legal construct or configuration contained in this case.

The Court of Appeals of Tennessee reasoned as follows:

> However, defamation is not a strict liability tort. To prevail in a defamation action, the plaintiff must also show some level of fault on the part of the defendant. *Nichols,* 569 S.W.2d at 418. The Tennessee Supreme Court decided that negligence is the standard in a defamation suit involving a private plaintiff. *Id.* In *Nichols,* the Supreme Court said,
>
> > In determining the issue of liability, the conduct of the defendant is to be measured against what a reasonably prudent person would, or would not, have done under the same or similar circumstances. . . . In our opinion, the appropriate question to be determined from a preponderance of the evidence is whether the defendant exercised reasonable care and caution in checking on the truth or falsity and the defamatory character of the communication before publishing it.
>
> *Id.* Finally the Restatement imposes liability only if the defendant acts negligently in failing to ascertain truth or falsity. *Press, Inc.,* 569 S.W.2d at 442; *Restatement (Second) of Torts* § 580B (1977).
>
> We note that all of the cases cited concern media defendants. However, in *Trigg v. Lakeway Publishers, Inc.,* 720 S.W.2d 69, 75 (Tenn. App. 1986), the Middle Section of this Court specifically held that a non-media co-defendant was entitled to the same First Amendment protection as a media defendant.

Opinion of the Court of Appeals of Tennessee (Appendix 12); (emphasis added).

First, the Court of Appeals of Tennessee relies upon two cases containing significantly different facts, *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978) and *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978), as supportive authority for applying First Amendment protections in the case at hand. The court in *Press* applied a First Amendment cloak of protection to the alleged defamatory speech because the plaintiff was a public figure, the defendant held media-status, and the speech was of a public concern. *Press* at 569. Similarly, the Court in *Nichols* afforded constitutional protection to the alleged libel because the publisher of the material was a **media-defendant.** *Nichols* at 418. It should be noted that the Court in *Nichols* applied the ordinary negligence standard set forth in *Gertz v. Robert Welch*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), as opposed to the actual malice standard of fault applicable to public figure plaintiffs. *Id.* at 415.

Second, the Court's strong reliance upon *Trigg* is fundamentally flawed. The Court of Appeals of Tennessee erroneously concluded that because a non-media defendant in *Trigg* was afforded First Amendment protection, the defendants in the instant case are also deserving of a constitutional cloak of privilege to defame. The Court of Appeals of Tennessee failed to scrutinize the basis or rationale for the *Trigg* court's analysis. The Court of Appeals of Tennessee mistakenly assumed that the *Trigg* court considered the status of the defendant as media or non-media as a significant, or even relevant, criteria in its

analysis for applying First Amendment protections. However, the determinative criteria in that case was not the status of the co-defendant as a member of the media, but rather the **status of the plaintiff as a public official and the status of the speech as a public controversy.** *Trigg* 720 S.W.2d 69 (*citing New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280), 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 87 S.Ct. 1975, 1991, 18 L.Ed.2d 1094, 1111 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974))

In *Trigg*, the plaintiff was member, chairman, and spokesman for a group of citizens of Lincoln County, Tennessee who styled themselves "Citizens for Tax Reform" and who were according to the plaintiff, interested in the governmental affairs of Lincoln County and who held public meetings to discuss public affairs. *Id.* at 70. The plaintiff had learned that Judge Mansfield had allegedly misused governmental funds. *Id.* The plaintiff and some members of his group met with Judge Robert Mansfield, eleven members of the County Commission, the County Attorney, and others to demand that Judge Mansfield resign within one week in the face of an ouster suit. *Id.* at 71.

On November 19, 1981, defendant Ms. Dorothy Thompson drafted a petition in support of Judge Mansfield and obtained over six hundred signatures. *Id.* Ms. Thompson met with reporters of *The Elk Valley Times* to provide a news story. *Id.* After speaking with defendant Thompson, the *Times* ran a story which quoted defendant Thompson as calling the plaintiff Trigg as "reckless and irresponsible." *Id.*

Trigg brought suit against Ms. Dorothy Thompson and the newspaper for their concerted effort to libel him. *Id.* The court held that Trigg was a public figure by virtue of his "activities with governmental affairs." *Id.* As such, the court held that the First Amendment precluded the public figure plaintiff from recovering for injury to his reputation unless he presented clear and convincing evidence that the defamatory falsehood was made with knowledge of its falsity or reckless disregard for its truth. *Id.*

It is essential to recognize that in *Trigg*, the plaintiff was a "public figure" and the subject matter of the alleged defamatory statement concerned a "public controversy." *Id.* at 72. As such, the status of the defendant as either a media figure or private/non-media figure was not relevant to the *Trigg* court in its determination of whether of not to afford the non-media defendant with First Amendment privileges. To the contrary, the court in *Trigg* looked to U.S. Supreme Court cases which held that for public officials or public figures to recover damages for a defamatory falsehood relating to the public figures' official conduct the public figures must overcome the constitutional protections afforded to the defendant who publicized the statement involving the matter of public concern. *Trigg* at 72 (*citing New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280), 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 87 S.Ct. 1975, 1991, 18 L.Ed.2d 1094, 1111 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)).

Thus, it is apparent that in the instant case the Court of Appeals relied upon *Trigg* for the proposition that First

Amendment protections should apply to a non-media defendant's defamatory statement. However, the analysis of the *Trigg* court clearly does not support the proposition that constitutional protections will be afforded to non-media defendants. As stated above, the determinative criteria in that case were the **status of the plaintiff as a public official and the status of the speech as a public controversy.**

Moreover, even if the court in *Trigg* had placed significance upon the status of defendant as media or non-media, the reason for elevating the non-media defendant to media-status is clear. The private/non-media defendant **acted in concert with** and publicized the alleged defamatory statement **through the media.** *Trigg* at page 71. The *Trigg* court specifically reasoned as follows:

> Individual who drafted petition and **caused it to be published in newspaper** could not be held liable for alleged defamation contained in petition with respect to **public figure** in absence of evidence that she entertained serious doubt as to the truth of those facts and was guilty of actual malice.

Id. at 74. (emphasis added) Thus, even if the plaintiff in *Trigg* held private status and the speech was of private concern, the application of the First Amendment would be based on the non-media defendant's actions as an alter-ego of the media.

As the above analysis of the cases cited in its opinion shows, the Court of Appeals of Tennessee did not cite any authority in Tennessee that applies First Amendment protections to defamatory speech when the status of the plaintiff is a private figure, the status of the defendant is

a private/non-media figure and the speech is of purely private concern. In fact, the Tennessee Court of Appeals in the instant case wrote an unprecedented decision based on the above flawed analysis of other Tennessee state court decisions citing the U.S. Supreme Court cases of *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 87 S.Ct. 1975, 1991, 18 L.Ed.2d 1094, 1111 (1967); and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

However, in view of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S.Ct. 2939, 2947 (1985), it seems clear that the Court did not establish a rule upon the states requiring a private plaintiff to show fault before liability can be imposed upon a non-media defendant. In other words, in light of *Dun & Bradstreet*, and even upon a close reading of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), it appears that the standards set out in § 580B, *Restatement (Second) of Torts* (1977) should only be applied when the defendant is a member of the media, as First Amendment protections do not require the plaintiff in a defamation suit to show fault on the part of the defendants in ascertaining the truth or falsity of the defamatory statement when the plaintiff and defendant are private individuals and the subject matter is not a matter of public concern. Most significantly, the court in *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978) clearly recognized the limits of the Court's position with respect to "not imposing liability without fault" as only pertaining to the media and not to private defendants. The Tennessee Supreme Court, after adopting § 580A and

§ 580B, *Restatement (Second) of Torts* (1977), limited its discussion, in *Press* at 442, to the news media.

> In adopting these standards, we look to the "profund national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." We are guided by our belief that the **news media** have not only a right but a duty to make searching inquiry into all phases of official conduct and to realistically evaluate and assess the performance of duty by public officials.
>
> Only under the most compelling circumstances should the court place obstacles in the way of the **news media,** or muzzle or deter their investigative efforts and reporting, even though the end result may be distasteful, despicable and shorn of all sense of fairness. The right of the **news media** to criticize official conduct is limited solely to their answerability for actual malice, which means that the publication was made with knowledge of its falsity or with reckless disregard for the truth. [emphasis added.]

The Tennessee Supreme Court in *Press* clearly adopted § 580A and § 580B, *Restatement (Second) of Torts* (1977) in the context of media defendants: i.e., the defendant in *Press v. Verran* was a member of the media; all the supporting cases cited in *Press* pertained to media defendants; and, the discussion contained in the opinion focused on media defendants.

Not only is it imperative to examine the "status of the defendant," but it is also imperative to examine the "status of the plaintiff" and the "status of the subject matter" in analyzing the effects of *Dun & Bradstreet, supra,* on

defamation law in Tennessee and in obtaining the correct result in the case at hand. The Court of Appeals stated that "[t]here is no dispute in this case that the plaintiff is a private figure." (Appendix 8 footnote 2) We would also submit that the "status of the subject matter" was not a "matter of public concern."

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S.Ct. 2939 (1985), the credit reporting agency, Dun & Bradstreet, issued an inaccurate credit report concerning the plaintiff, Greenmoss Builders. The credit report indicated that Greenmoss had recently filed a voluntary petition of bankruptcy although Greenmoss was solid financially and had not filed such a petition. Greenmoss's bank and principal creditor delayed consideration of future financing until the discrepancy was cleared up and later terminated Greenmoss's credit for reasons allegedly unrelated to the report even though the bank's representative never actually believed the report.

The error was committed because one of Dun & Bradstreet employees, a 17 year old high school student hired to review Vermont bankruptcy petitions, had mistakenly attributed a bankruptcy petition of a former Greenmoss employee to Greenmoss Builders. The routine practice of Dun & Bradstreet was to first corroborate the accuracy of such a report with the business before publication, however no verification prior to publication was attempted in the case of Greenmoss.

The five paid subscribers to Dun & Bradstreet's service who received the inaccurate credit report also received a corrective notice stating that Greenmoss "continued in business as usual." Greenmoss was not satisfied

with the corrective notice, as it implied that the initial error had been caused by Greenmoss, not Dun & Bradstreet, and subsequently commenced an action against Dun & Bradstreet for defamation.

The trial court instructed the jury that Dun & Bradstreet could not be held liable unless the plaintiff, Greenmoss, showed "malice or lack of good faith on the part of the defendant." The jury returned a verdict in favor of the plaintiff for $50,000 in compensatory damages and $300,000 in punitive damages. The trial court granted the defendant's motion for a new trial after realizing that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) prohibits any award of "presumed" or "punitive" damages in the absence of actual malice – knowledge of falsity or reckless disregard for the truth – a standard not properly articulated to the jury.

The Vermont Supreme Court reversed and held that Dun & Bradstreet was not a member of the "media," and "as a matter of federal constitutional law the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions." *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 75, 461 A.2d 414, 418 (1983), aff'd on other grounds, 105 S.Ct. 2939 (1985). In other words, the Vermont Supreme Court held *Gertz* to be inapplicable to nonmedia defendants.

In *New York Times Co. v. Sullivan* "the Court for the first time held that the First Amendment limits the reach of state defamation laws." *Dun & Bradstreet* at 2943. In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44, 91 S.Ct. 1811, 1820, 29 L.Ed.2d 296 (1971) the Court in a plurality opinion suggested that First Amendment protections

should "extend to libels of any individual so long as the defamatory statements involved a 'matter of public or general interest'. . . . " *Dun & Bradstreet* at 2943. The Tennessee Supreme Court in *Press* at 438 recognized the containment of *Rosenbloom* by *Gertz* at it stated: "[t]he fragile foundation of *Rosenbloom* endured for only three years."

The First Amendment, after obtaining a brief yet heightened scope of application at the expense of state common law, began to be limited in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) where the Court held that "the protections of *New York Times* did not extend as far as *Rosenbloom* suggested." *Dun & Bradstreet* at 2943. More specifically, the Court in *Gertz* held that "the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times.*" *Dun & Bradstreet* at 2943. In *Gertz* the Court struck a balance between the interests of the First Amendment and the interest of the states with respect to libel actions brought by public plaintiffs. *Dun & Bradstreet* at 2944. The Court indicated that the interests of the First Amendment and the interest of the states are different and that a different balance would be struck when the plaintiff was a private person as opposed to a public person. *Dun & Bradstreet* at 2944. The Tennessee Supreme court in *Press* at 439 clearly saw this distinction as the Court incorporated the language from *Gertz* in its opinion as follows:

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false

> statements than private individuals normally enjoy. **Private individuals** are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.
>
> * * *
>
> Thus, **private individuals** are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery. 418 U.S. at 345, 94 S.Ct. at 3010, 41 L.Ed.2d at 808.

(emphasis added).

The U.S. Supreme Court in *Gertz* at 3010 stated that "[t]he extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable." Facilitating our understanding of First Amendment boundaries respecting defamation actions involving private plaintiffs and media defendants, in *Press* at 439, the Tennessee Supreme Court, relying on *Gertz*, stated:

> The Court declared that "the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them." 418 U.S. at 343, 94 S.Ct. at 3008-3009, 41 L.Ed.2d at 807. Following this rationale, the Court specifically authorized the states to "define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood" but only "so long as they do not impose liability without fault." 418 U.S. at 347, 94 S.Ct. at 3010, 41 L.Ed.2d at 809. Our recent case of *Memphis Publishing Company v. Nicholas*, Tenn., 569 S.W.2d

> 412 (Tenn. 1978), quotes and follows this authorization. *Memphis Publishing Company* establishes standards for suits by private individuals and has no application to those involving public officers or public figures, acting in their official capacities.

In *Rosenbloom, New York Times* and *Gertz* all the defendants were members of the media and the subject matter involved public issues where uninhibited, robust, and wide-open debate was deserving of First Amendment protections. In *Dun & Bradstreet* at 2944, the Court stated that it had previously "never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern." The Court went on to state:

> We have long recognized that not all speech is of equal First Amendment importance. It is speech on " 'matters of public concern' " that is "at the heart of the First Amendment's protection." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776, 98 S.Ct. 1407, 1415, 55 L.Ed.2d 707 (1978), citing *Thornhill v. Alabama,* 310 U.S. 88, 101, 60 S.Ct. 736, 743, 84 L.Ed. 1093 (1940).

The elevation, or perceived elevation, of First Amendment application to areas of defamatory speech, formerly addressed by state common law, led to confusion among the various jurisdictions regarding the appropriate application of First Amendment law. This intrusion of the First Amendment, and resulting confusion prior to *Dun & Bradstreet,* understandably caused erroneous state court decisions to issue. In an attempt to follow U.S. Supreme Court decisional law, the American Law Institute pronounced § 580B *Defamation of Private Person*

Restatement (Second) of Torts (1977). § 580B was issued after *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44, 91 S.Ct. 1811, 1820, 29 L.Ed.2d 296 (1971) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); yet, before *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985). It is important to remember that prior to *Dun & Bradstreet* the Court had "never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern." *Dun & Bradstreet* at 2944. In light of *Dun & Bradstreet*, § 580B of *Restatement (Second) of Torts* (1977) should be stricken or revised with respect to the imposition of malice, reckless and/or negligent standards before liability can be imposed as the Court never intended fault standards to be a required showing by private plaintiffs in defamation actions when the speech in question did not concern an issue of public concern. In other words, the First Amendment is not applicable to "private plaintiff/no issue of public concern" defamation actions.

This Court in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), reiterated its position with respect to a case with a configuration of speech and plaintiff involving a "private-figure plaintiff" and also "speech of purely private concern." Id. at 776. The Court specifically stated:

> When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun and Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

Philadelphia Newspapers, Inc. at 776.

With respect to the case at hand, it is not necessary to determine whether the media/non-media distinction should be maintained and whether First Amendment protections should be afforded to media defendants even when the subject matter does not involve any issue of public concern since in the case at hand the defendants are not affiliated with the media. Since the status of the plaintiff is private, and the status of the defendant is private and the status of the subject matter does not involve an issue of public concern, this Court should remove the First Amendment cloak placed upon the defendants by the Tennessee Court of Appeals.

In *Dun & Bradstreet* at 2946-2947, the U.S. Supreme Court in holding that the credit report was not speech about a matter of public concern stated:

> It was speech solely in the individual interest of the speaker and its specific business audience. Cf. *Central Hudson Gas & Elec. Corp. v. Public Services Comm'n of New York*, 447 U.S. 557, 561, 100 S.Ct. 2343, 2348, 65 L.Ed.2d 341 (1980). This particular interest warrants no special protection when – as in this case – the speech is wholly false and clearly damaging to the victim's business reputation. Cf. *id.*, at 566, 100 S.Ct., at 2351; *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772, 96 S.Ct. 1817, 1830-1831, 48 L.Ed.2d 346 (1976). Moreover, since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any "strong interest in the free flow of commercial information." Id., at 764, 96 S.Ct., at 1827. There is simply no

> credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S., at 270, 84 S.Ct., at 720.

In the case at hand, the libelous identification was made only to St. Francis Hospital employees. The libelous statements were not made public information or knowledge through the media or any other type of public informant. The Petitioner has not achieved any level of public personage through her profession, affairs or mode of living. Because Petitioner is not a public figure or official, her suspected involvement was not a public issue of widespread debate. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2947 (1985). In essence, it can be said that there is no credible argument that the speech uttered by Service Merchandise and its agents requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open."

II. THE COURT OF APPEALS ERRED IN AFFORDING A PUBLIC INTEREST PRIVILEGE TO A COMMUNICATION WITH A PRIVATE INDIVIDUAL NOT ACTING IN CONCERT WITH THE POLICE AND IN THE PRESENCE OF UNCONCERNED THIRD PARTIES.

The court held that "even if the statements of the defendants constituted defamation, we believe that the defendants are entitled to summary judgment because those statements are conditionally privileged under a public interest privilege." (Appendix A14-A15). While the Court of Appeals of Tennessee had a scarce amount of

authority available regarding the public interest privilege in Tennessee, its analysis of the public interest privilege is obviously flawed in several respects.

As a preface to its holding, the Court of Appeals of Tennessee stated that no Tennessee Court **has ever applied** the public interest privilege to **communications with a private person** (Appendix at 17). Nevertheless, the Court surprisingly cited *Travis v. Bacherig*, 7 Tenn. App. 638 (1928) as support for its affording such a privilege in this case.

The *Travis* decision involved communications to public law enforcement officers, not private citizens acting independently of the police. *Id.* at 640. The Court in *Travis* did not address statements made to private citizens.

The Court of Appeals of Tennessee, in the instant case, correctly held that for the public interest privilege to protect an otherwise defamatory communication, the communication "cannot be made in the presence of a **third person who does not have a legitimate interest in the matter.**" (Appendix 17), or "**to persons unconcerned.**" (Appendix 17) (emphasis added). However, the Court of Appeals clearly erred in its determination of which recipients were concerned with or had an interest in the subject matter of the defamatory communication.

The court allowed the public interest privilege to protect statements made in the presence of a third party that the **court itself** did not conclude possessed an interest in the transaction. The Court of Appeals held that the security guards and Luton "were within the purview of section 598." (Appendix 18). However, the Court did not include **Luton's friend Rita Schroeder** within the class of

persons privileged to hear the statement. Yet, the Court specifically found this non-interested party was **present** when the defamatory statements were made. (Appendix 3) ("Upon arriving, Michael Thomas escorted **Luton and Schroeder** to Lisa Duncan and Velma Wilson, the two clerks who were present when the VCR's were purchased.") (emphasis added).

Rita Schroeder is clearly not an individual contemplated by section 598 of the *Restatement (Second) of Torts.* Schroeder's employer, St. Francis Hospital, was not allowed to file a criminal incident report. Schroeder, while president of St. Francis Hospital, had never been on an investigation before. Schroeder admits that she accompanied Luton, the victim of the crime, as a "**friend**". The cornerstone of the public interest privilege is the requirement that statements be communicated **only to concerned, interested parties.** (Appendix 18). It is absurd to afford such a privilege to a communication in the presence of an interested party's **friend** whose only reason to be present when a defamatory statement is made is to provide moral support.

With respect to the security guards, the Court of Appeals noted:

> "police depend on the separate investigations and services of independent security forces to aid their own investigation. A uniformed security guard may act to apprehend a criminal or arrest a subject and detain him until the police arrive. The initial investigation by the security forces are many times the springboards of successful investigations."

(Appendix 17).

The Petitioner agrees with the general discussion by the Court of Appeals of Tennessee concerning the role of security guards in our society. However, the above comments certainly contemplate security guards that are **authorized to act.** In the instant case, the policies of St. Francis Hospital limited the jurisdiction of the security guards **to the premises** of St. Francis. Moreover, the above comments of the Court do not address the issue of whether or not the security guards possessed an **interest in the subject matter** of the defamatory statements made by the Defendants. Even if the security guards were authorized to conduct an investigation at Service Merchandise, the security guards were investigating on behalf of an entity that was not the victim of the theft or credit card fraud. As such, the Memphis Police Department **refused to allow the security guards to file a criminal incident report.** The finding by the Memphis Police Department that the security guards did not have an interest in the theft or credit card fraud of January 2, 1991 evidences the absence of an interest or concern that is necessary for the public interest privilege to be invoked. As such, the definitive statement by the Court that "the statement was not overheard by any third parties" is in **direct conflict** with the specific findings of fact of the Court of Appeals.

The libelous statement publicized by the Defendants is not the type of communication protected by the public interest privilege. As stated above the public interest privilege will be lost or defeated if the statement is made in an excessive manner to unconcerned parties. As such, a defamatory statement publicized to a protected class of persons authorized to take official action in the public

interest **becomes actionable if it is reduced to writing and publicized to the world at large.** *Prosser and Keeton on the Law of Torts,* Fifth Edition, § 115, p. 831 (publication of a statement in a newspaper made to a public official loses protection).

In the instant case, the clerks lost any public interest privilege that they may have enjoyed when they reduced their defamatory statement to writing. Once the identification was put in writing, the defamatory statement became part of a medium that may be disseminated to any number of parties, including individuals not within the purview of section 598 of the *Restatement (Second) of Torts.*

The court also erred in holding that the elements of Section 598 of the *Restatement (Second) of Torts* were satisfied in this case. This section sets forth the elements of the public interest privilege as follows:

> § 598 Communication to One Who May Act in the Public Interest
>
> An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> a) there is information that affects a sufficiently important public interest, and
>
> b) the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true.

Restatement (Second) of Torts § 598 (1977). For a communication to be conditionally privileged under this section,

the speaker must correctly or **in the exercise of reasonable care** believe that the public interest requires communication of the defamatory matter. In the instant case, for the privilege to apply, the clerks were required to entertain a reasonable belief that the public interest mandated the communication to Luton, Schroeder and the security guards. However, it is undisputed that the clerks negligently violated a standard internal policy which **prohibited** clerks from communicating with the general public regarding credit card fraud and allowing communications only with the local police. In light of the fact the clerks carelessly violated an internal policy **designed to protect members of the public** suspected of credit card fraud from unprofessional investigations, the clerks had **reason to believe that the statements were prohibited by public policy, not required by it.** Again, at the least, this question is properly one for the trier of fact and not amenable to disposition by summary judgment.

Finally, it is a question of fact for the trier of fact as to whether or not the clerks reasonably believed Luton, Schroeder and the security guards were authorized or privileged to take action in accordance with Section 598. It is a matter of common knowledge that private security guards are not authorized to detect and apprehend criminals away from the premises that they are hired to protect. Moreover, there is no evidence in the record to support the proposition that the clerks reasonably believed Schroeder was an interested party authorized to apprehend the suspect.

CONCLUSION

This case clearly presents a configuration of a private-figure plaintiff, private/non-media defendants and speech of purely private concern. This construct of private parties and speech that is not a matter of public concern does not cloak the Defendants/Respondents with First Amendment protections with respect to their defamatory utterances. This Honorable Supreme Court is requested to address the misapplication of constitutional protections provided by Tennessee state courts to private defendants uttering defamatory speech of a private nature respecting private plaintiffs.

Moreover, this Honorable Supreme Court should redress the Tennessee Court of Appeals' application of a public interest privilege to a communication with a private individual not acting in concert with the police and in the presence of unconcerned third parties.

The Petitioner requests that this Court reverse the judgment of the Court of Appeals of Tennessee which affirmed the trial court's Order Granting Defendants' Motion for Summary Judgment.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

BERTHA L. PATE,

Plaintiff-Appellant,

Vs.

Circuit Law No. 38960 T.D.
C.A. No. 02A01-9505-CV-00112

SERVICE MERCHANDISE CO., INC., MICHAEL THOMAS, MANAGER, LISA DUNCAN, VELMA WILSON,

Defendants-Appellees.

FROM THE CIRCUIT COURT OF SHELBY COUNTY
THE HONORABLE GEORGE H. BROWN, JR., JUDGE

George E. Skouteris, Sr., of Memphis
John W. Leach of Memphis
For Appellant

Gail O. Mathes of Memphis
For Appellees

AFFIRMED

Opinion filed: SEP 26 1996

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

DAVID R. FARMER, JUDGE

HOLLY KIRBY LILLARD, JUDGE

This is a defamation case. Plaintiff Brenda L. Pate, appeals from the order of the trial court granting summary judgment to defendants, Service Merchandise, Co., Inc., Michael Thomas, Lisa Duncan, and Velma Wilson. The sole issue is whether the trial court erred in granting the defendants' motion for summary judgment.

I.

The plaintiff filed this action after she was terminated from her position as a nurse manager by St. Francis Hospital. The plaintiff was fired after she was suspected of stealing a co-employee's (Laverne Lutton's) credit card and using the credit card to purchase two video cassette recorders (VCRs) from Service Merchandise.

Lutton's credit card was stolen on January 2, 1991 while she was working at the hospital. Lutton discovered later that day that her credit card had been stolen, and she reported the incident to the security department at St. Francis Hospital. The chief safety officer at St. Francis, Richard A. Hunt, reported the theft to Union Planters National Bank. Lutton filed a report of the incident with the Memphis Police Department.

On January 11, 1991, Lutton received her credit card statement from Union Planters and discovered a charge at Service Merchandise which she did not make. She asked Rita Schroeder, the President of St. Francis Hospital, to

accompany her to Service Merchandise in an attempt to discover what had been charged to the card and to determine the identity of the thief. When Lutton and Schroeder arrived at Service Merchandise, they were informed by store management that the items charged to the card could not be determined without the credit card receipt, but with the help of Michael Thomas, the assistant manager of Service Merchandise, Lutton eventually discovered that two VCRs were purchased using her credit card.

Lutton suspected the plaintiff of the theft based upon a conversation in which she told the plaintiff about the theft, and the plaintiff did not express concern or surprise. Lutton further believed that the plaintiff was the thief because she felt like God was telling her that the plaintiff was responsible for the theft.

Based upon her suspicions of the plaintiff, Lutton obtained photographs of the plaintiff from Robert Halford, the Director of Human Resources at St. Francis Hospital, and, along with Schroeder, returned to Service Merchandise. Upon arriving, Michael Thomas escorted Lutton and Schroeder to Lisa Duncan and Velma Wilson, the two clerks who were present when the VCRs were purchased. Thomas had previously been informed that Lutton and Schroeder were at the store regarding a fraudulent credit card purchase. Without reporting the incident to the unit manager or the district loss prevention manager, Thomas decided to cooperate with the investigation. However, the Service Merchandise policy manual states, "All known or suspected credit card fraud is reported to the appropriate District Loss Prevention Manager by the Unit Manager." In addition, it is standard Service Merchandise policy not to talk with the general public

regarding credit card fraud, but only to talk with the local police.

Lutton presented the defendant clerks, Velma Wilson and Lisa Duncan, with a photographic line-up consisting of four pictures. Three of the photographs were pictures of white females, and one of the pictures was of a black female. Lutton first showed the four photographs to Wilson, whereupon she picked up the picture of the plaintiff, took it to the other clerk, Lisa Duncan, and asked her if she remembered the person in the photograph (the plaintiff). Duncan then proceeded to the counter to view the other three pictures of the white females. Both clerks identified the plaintiff as the individual who purchased the VCRs on January 2, 1991, but admitted that the person in the photograph had a different hairstyle. The alleged defamation by each clerk is the oral statement identifying the plaintiff.

Upon returning to the hospital, Lutton and Schroeder informed the St. Francis Hospital security department about the identification of the plaintiff, and the security department commenced its own investigation. Lt. Richard A. Hunt and Sgt. Herbert David McKee were placed in charge of the investigation and constructed their own photo line-up. While the photo spread contained pictures of five black women, the photograph of the plaintiff was a blown-up version of the picture that Lutton used and was much larger than the other four.

In full uniform, Hunt and McKee took their photo line-up to Service Merchandise to conduct a second identification procedure. Once again, Thomas authorized McKee and Hunt to present their photo line-up to the

clerks, Wilson and Duncan. After viewing the photographic line-up, the clerks noted that the plaintiff's photograph was outstanding and different from the other pictures in the spread. The clerks identified the blown-up version of plaintiff's picture and then executed a written statement identifying the plaintiff as the person who purchased the two VCRs with Lutton's credit card. The alleged defamatory written statement by Velma Wilson is "I Velma Wilson pick out picture #3 who I sold 2 VCR to her and a black man." The alleged defamatory statement by Lisa Duncan is "I, Lisa R. Duncan, do remember seeing the person on photo number 3 in Service Merchandise. I was not the actual person who rang up the transaction, but I remember the customer."

Following the second identification, the plaintiff was advised by Halford, who was acting for St. Francis, that she would be cleared of any wrongdoing if she could prove her whereabouts on January 2, 1991, between the hours of 2:00 and 3:00 p.m. (the time during which the credit card was stolen from the hospital). On March 14, 1991, St. Francis suspended the plaintiff because she was unable to prove her whereabouts on the relevant date and time other than by her own statements. On March 18, 1991, St. Francis officially terminated the plaintiff as an employee.

Plaintiff's amended complaint[1] alleges that defendant Service Merchandise and its employees, defendants Thomas, Wilson, and Duncan, were negligent in making the identification of plaintiff, Bertha Pate. The complaint further avers that Service Merchandise negligently violated its own policy by allowing its employees to talk to personnel of St. Francis Hospital's security in conducting its investigation concerning the stolen property. The complaint avers that these defendants maliciously or negligently identified plaintiff as the person who purchased the VCRs on a stolen credit card. Defendants' answer joins issue on the material allegations of the complaint and denies that there was any negligent or malicious identification and denies that there were any slanderous or libelous statements made concerning plaintiff. The answer avers that the defendants acted in good faith and that their communications were made in a privileged context by cooperating in an investigation of possible credit card theft.

The trial court granted summary judgment for all defendants stating that there was no statement, oral or written, that constituted defamation of the plaintiff, either libel or slander, as a matter of law; and that there was no act of commission or omission which constituted negligence as a matter of law.

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[1] The complaint also names as defendants St. Francis Hospital, Laverne Lutton and various other officers and employees of St. Francis Hospital. A consent order of dismissal was entered as to these defendants, and the action against them is not involved in this appeal.

II.

A trial court should grant a motion for summary judgment only if the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Tenn.R.Civ.P. 56.03; ***Byrd v. Hall,*** 847 S.W.2d 208, 210 (Tenn. 1993); ***Dunn v. Hackett,*** 833 S.W.2d 78, 80 (Tenn. App. 1992). The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. ***Byrd,*** 847 S.W.2d at 210. When a motion for summary judgment is made, the court must consider the motion in the same manner as a motion for directed verdict made at the close of the plaintiff's proof; that is, "the court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." ***Id.*** at 210-11. In ***Byrd,*** the Tennessee Supreme Court stated:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. [citations omitted]. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth ***specific facts*** showing that there is a genuine issue of material fact for trial.

Id. at 211. (emphasis in original).

The summary judgment process should only be used as a means of concluding a case when there are no genuine issues of material fact, and the case can be

resolved on the legal issues alone. ***Id.*** at 210 (citing ***Bellamy v. Federal Express Corp.,*** 749 S.W.2d 31, 33 (Tenn. 1988)). Summary judgment is not to be used as a substitute for a trial of genuine and material factual issues. ***Byrd,*** 847 S.W.2d at 210 (citing ***Blocker v. Regional Medical Ctr.,*** 722 S.W.2d 660, 660-61 (Tenn. 1987)). Where a genuine dispute exists as to any material fact or as to the conclusions to be drawn from those facts, a court must deny a motion for summary judgment. ***Byrd,*** 847 S.W.2d at 211 (citing ***Dunn,*** 833 S.W.2d at 80).

III.

In ***Press, Inc. v. Verran,*** 569 S.W.2d 435 (Tenn. 1978), our Supreme Court adopted the ***Restatement (Second) of Torts*** (1977) standards for liability in a defamation suit. The Supreme Court said:

> We are impressed with Standards 580A[2] and 580B, Restatement (Second) of Torts (1977). They read as follows:
>
> * * *
>
> § 580B. *Defamation of Private Person.* One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he

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[2] Restatement (Second) of Torts § 580A (1977) deals with the defamation of a public person. There is no dispute in this case that the plaintiff is a private figure.

> (a) knows that the statement is false and that it defames the other,
>
> (b) acts in reckless disregard of these matters, or
>
> (c) acts negligently in failing to ascertain them.
>
> We believe that these standards meet the criteria of our federal and state constitutions and we adopt them as the law of this jurisdiction.

Press, Inc., 569 S.W.2d at 442.

The plaintiff must establish that a false and defamatory statement was published concerning the plaintiff. ***Stones River Motors, Inc. v. Mid-South Publishing Company, Inc.***, 651 S.W.2d 713, 717 (Tenn. App. 1983). The defendants contend that there are no defamatory statements because the defendants' statements are only defamatory in light of extrinsic facts.[3]

Traditionally, defamations were classified as either actionable ***per se*** or ***per quod***. Any libel which was defamatory on its face, ***i.e.***, the danger of injury to reputation was apparent from the mere words themselves, has been held to be actionable ***per se***. Words which were defamatory only in the light of certain extrinsic facts were said to be libelous ***per quod***. ***Memphis Publishing Co. v. Nichols***, 569 S.W.2d 412, 418-19 (Tenn. 1978). Historically, the plaintiff had to plead and prove special damages when the defamation was libel ***per quod***. ***Id.*** at 418. However in *Nichols*, the Tennessee Supreme Court held that, because

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[3] There is no dispute in this case that the statements were concerning the plaintiff or that the plaintiff suffered damages.

presumed damages were no longer permissible[4], the ***per se/per quod*** distinction was no longer viable, and that the plaintiff had to plead and prove injury from the alleged defamatory words, whether their defamatory meaning was obvious or not. ***Id.*** at 419.

The Supreme Court in ***Nichols*** was concerned with presumed damages and strict liability, not defamation in light of extrinsic facts. The Court did not hold that words which were defamatory only in the light of certain extrinsic facts were no longer actionable; instead they held that damages must be shown in all defamation cases. Although the classification of libel ***per quod*** has been eliminated in Tennessee, extrinsic facts may still be used to show the defamatory meaning of words that are not defamatory on their face.

However, in such cases the words are said to require an innuendo – that is, a statement of circumstances which give to the words a signification and meaning which they do not have on their face, but which cannot enlarge, extend, or change the sense of the words. ***Fry v. McCord Bros.,*** 95 Tenn. 678, 685, 33 S.W. 568, 570 (1895). The extrinsic facts cannot be stretched to give the words a defamatory meaning that is not implied by the words. The literal truth or non-defamatory nature (without extrinsic facts) of the actual words used is not a defense. ***Nichols,*** 569 S.W.2d at 420. Words which are substantially true can nevertheless convey a false meaning whether

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[4] The United States Supreme Court held that presumed damages and strict liability in defamation cases were unconstitutional. ***Gertz v. Robert Welch, Inc.,*** 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

intended by the speaker or not. The proper question is whether the meaning reasonably conveyed by the published words is reasonably understood in a defamatory sense by the reader or listener. ***Id.*** at 419-20; ***Tompkins v. Wisener,*** 33 Tenn. 458, 463; ***Restatement (Second) of Torts*** § 563 (1977). The determination of whether a published report is capable of a defamatory meaning is a question of law for the court. ***Nichols,*** 569 S.W.2d at 419.

Applying ***Nichols*** to the case ***sub judice,*** we conclude that the defendants' statements are capable of a defamatory meaning. When presented with the photo line-up, Duncan and Wilson, the defendant clerks, both orally identified the plaintiff as the woman who was in the store on January 2, 1991 and who purchased two VCRs using a credit card. Later, when the security guards approached the defendants with a second photo line-up, each clerk executed a written statement identifying the plaintiff as the woman who participated in the VCR transaction. While these identifications are not defamatory on their face, it is possible for the oral and written statements to reasonably convey a defamatory meaning. The circumstances surrounding the investigation of the credit card theft give the identifications a significance that is not apparent by the actual words themselves. The inference that the plaintiff was involved in the VCR transaction and, therefore, the theft, is not one that enlarges or expands the scope of the words. It is the meaning directly implied by the words and understood by the recipients, Lutton and the security guards. The identification of a person in a photo line-up obviously imputes them with the crime being investigated, regardless of whether the speaker means to or not. The non-defamatory nature of

the words themselves is not a defense because they convey a false meaning that was capable of being understood by Lutton and the security guards in a defamatory sense.

However, defamation is not a strict liability tort. To prevail in a defamation cause of action, the plaintiff must also show some level of fault on the part of the defendant. ***Nichols,*** 569 S.W.2d at 418. The Tennessee Supreme Court decided that negligence is the standard in a defamation suit involving a private plaintiff. ***Id.*** In ***Nichols,*** the Supreme Court said,

> In determining the issue of liability, the conduct of the defendant is to be measured against what a reasonably prudent person would, or would not, have done under the same or similar circumstances. . . . In our opinion, the appropriate question to be determined from a preponderance of the evidence is whether the defendant exercised reasonable care and caution in checking on the truth or falsity and the defamatory character of the communication before publishing it.

Id. Finally, the Restatement imposes liability only if the defendant acts negligently in failing to ascertain truth or falsity. ***Press, Inc.,*** 569 S.W.2d at 442; ***Restatement (Second) of Torts*** § 580B (1977).

We note that all of the cases cited concern media defendants. However, in ***Trigg v. Lakeway Publishers, Inc.,*** 720 S.W.2d 69, 75 (Tenn. App. 1986), the Middle Section of this Court specifically held that a non-media co-defendant was entitled to the same First Amendment protection as a media defendant.

Plaintiff claims that the defendants were negligent because they did not take advantage of surveillance cameras to verify their identifications. However, the record establishes that no surveillance cameras were in place in either the electronics department (where the transaction took place) or the customer pick-up area (where the purchaser receives the goods purchased) on the date of the alleged transaction. The store manager, Michael Thomas, stated in his affidavit that there were no surveillance cameras in the electronics department and in his deposition that there were no surveillance cameras in the customer pick-up area. The defendants did not have any way to verify the truth of their identifications except through personal observation and memory.

The plaintiff further contends that the clerks were negligent because they entertained doubts about the identification. Duncan admitted that the person in the photograph had a different hair style than the plaintiff. However, the record states that Duncan was sure that it was the same person because she had a long time to look at the woman during the transaction. The record is devoid of any proof that the clerks doubted their identification. Negligence is not established by the fact that a different hairstyle appeared in the picture. Many people wear their hair in different styles on different days but are still recognizable.

The plaintiff also argues that the clerks could have cleared up any doubts by sending the credit card receipt to a handwriting expert to determine if the plaintiff was the one involved in the VCR transaction. While this may be literally true, we believe that it is unreasonable and absurd to expect a layperon who is asked to identify

someone in a picture to suggest a handwriting expert before pointing to a picture of someone they reasonably believe that they recognize.

Finally, the plaintiff argues that Service Merchandise and its clerks were negligent because they did not follow internal Service Merchandise policies and procedures regarding fraudulent credit card transactions. The plaintiff alleges that at the time in question it was the standard policy of Service Merchandise that its employees were prohibited to talk with the general public regarding credit card fraud and could only discuss credit card fraud with the police. This argument fails because a violation of corporate policy by the clerks has nothing to do with ascertaining truth or falsity. Even if they violated policy by speaking with Lutton and the security guards, the clerks may have been careful and reasonable in what they told them.

We believe that the defendants exercised reasonable care and caution in checking on the truth or falsity of their statements, and therefore, an essential element of defamation fails. A reasonable and prudent person would rely on their own observations and memory to identify someone in a photo line-up. We hold that the trial court was correct in granting summary judgment because no statement, either written or oral, constituted defamation because there was no fault on the part of any defendant.

IV.

Even if the statements by the defendants constituted defamation, we believe that the defendants are entitled to

summary judgment because those statements are conditionally privileged under a public interest privilege.

A conditional privilege is recognized where the interest which the defendant is seeking to vindicate or further is regarded as sufficiently important to justify some latitude for making mistakes. W. Page Keeton et al., ***Prosser and Keeton on the Law of Torts,*** § 115, at 825 (5th ed. 1988). The Tennessee Supreme Court authorized conditional privileges in ***Southern Ice Co. v. Black,*** 136 Tenn. 391 (1916):

> Qualified privilege extends to all communications made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation. . . . The rule announced is necessary in order that full and unrestricted communication concerning a matter in which the parties have an interest may be had. It is grounded in public policy as well as reason.

Id. at 401 (citations omitted); ***see also Price v. Sale,*** 8 Tenn. Civ. App. 382, 392-3 (1918).

Conditional privileges may cover many different types of interests including a common interest and a public interest. Keeton et al., ***supra,*** at 826-31. The common interest privilege has been recognized in Tennessee to cover communications between employees or agents of the same business or corporation. ***See Woods v. Helmi,*** 758 S.W.2d 219 (Tenn. App. 1988); ***Southern Ice Co.,*** 136

Tenn. 391. We do not decide if the parties involved in the case ***sub judice*** have a common interest because we believe that the defendants' statements are covered by a public interest privilege.

The public interest privilege was discussed by the Tennessee Court of Appeals in ***Travis v. Bacherig,*** 7 Tenn. App. 638 (1928):

> The defense of privileged communication must be made in good faith in the prosecution of an inquiry regarding a crime which has been committed, and for the purpose of detecting and bringing to punishment the criminal. "The law requires such charges to be made in the honest desire to promote the ends of justice, and not with spite or malicious feeling against the person accused, nor with the purpose of obtaining any indirect advantage to the accuser. Nor should serious accusations be made recklessly or wantonly; they should always be warranted by some circumstances reasonably arousing suspicion, and they should not be made unnecessarily to persons unconcerned, nor before more persons, nor in stronger language than necessary."

Id. at 643 (citations omitted).

The interests of the public in preventing crime and punishing criminals outweigh the interest of any plaintiff concerning statements of accusation, as long as the accusation is made in good faith and without express malice. The Restatement (Second) of Torts (1977) states the important public interest privilege as follows:

§ 598. *Communication to One Who May Act in the Public Interest*

An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that

(a) there is information that affects a sufficiently important public interest, and

(b) the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true.

Restatement (Second) of Torts § 598 (1977).

Our Supreme Court has adopted sections 580A and 580B of the Restatement as the law on defamation in Tennessee. ***Press, Inc.,*** 569 S.W.2d at 442. Section 598 is cross-referenced in section 580B. We are not aware of any Tennessee case that has considered the public interest privilege as it applies to communications with private citizens; however, we believe the Restatement is a correct statement of the law in this regard and should be applied in this state.

There is no doubt that the investigation of a crime and the apprehension of criminals are important public interests. In the case ***sub judice,*** even though the investigation was not conducted by the local police, the investigation by the security department could have led to the apprehension of the criminal. It is reasonable for anyone in the position of the clerks to believe that the identification would affect the public interest of preventing crime. The public interest privilege is grounded in public policy,

and we should encourage cooperation with an investigation of a criminal matter.

The statements made in the course of the cooperation cannot include irrelevant defamatory matter not related to the public interest and cannot be made in the presence of a third person who does not have a legitimate interest in the matter. Keeton et al., ***supra***, at 832. The statements in this case were direct and to the point and were not overheard by any third parties. The plaintiff contends, however, that the recipients of the statements, Lutton and the security guards, were not the type of citizens contemplated by § 598. We must respectfully disagree. The comment to § 598 states, "The privilege . . . affords protection to a private citizen who publishes defamatory matter to a third person even though he is not a law enforcement officer, under circumstances which, if true, would give the recipient a privilege to act for the purpose of preventing a crime or of apprehending a criminal. . . . " ***Restatement (Second) of Torts*** § 598 cmt. f (1977).

We believe that Lutton and the security guards are within the purview of § 598. It was reasonable for the clerks to rely on the uniformed security guards and to help Lutton, the victim of a crime.[5] The victim of a crime has the unfortunate privilege of acting to apprehend a criminal. Most times it would be impossible for the police

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[5] The plaintiff claims that Lutton was not the victim because the security guards were investigating credit card fraud. However, it is clear that Lutton was the victim of a theft, which was the real thrust of the investigation by the St. Francis security department.

to successfully investigate and apprehend criminals without the actions of the victim. Likewise, the police depend on the separate investigations and services of independent security forces to aid in their own investigations. A uniformed security guard may act to apprehend a criminal or arrest a subject and detain him until the police arrive. The initial investigations by security forces are many times the springboards for successful convictions.

Even if the recipient is not a proper candidate to hear the defamatory statements, we believe the cornerstone of the public interest privilege should be good faith. As stated in ***Travis,*** 7 Tenn. App. at 643, "the defense of privileged communication must be made in good faith . . . in the honest desire to promote the ends of justice." If the speaker of the defamatory statement makes the identification or accusation in good faith, the statement is covered by the public interest privilege even if the speaker makes a mistake about the recipient. Prosser and Keeton state that "while a misguided notion as to the defendant's moral obligation or justification to make the statement will not exonerate him, he is privileged to publish it to any person who reasonably appears to have a duty, interest or authority in connection with the matter." Keeton et al, ***supra,*** at 833.

The clerks made their identifications in good faith in an honest attempt to help in the investigation. While the record indicates that Lutton may not have been acting in good faith, it is the good faith of the speaker, not the recipient, that is the key to the public interest privilege. The uniformed security guards reasonably appeared to the clerks to have a duty and the authority to conduct the investigation. Lutton also appeared to have an interest

that the clerks could vindicate by making a good faith identification.

The privilege can be lost, however, if the defendant does not act with good faith or acts with actual malice. When a statement is conditionally privileged, it is not actionable unless actual or express malice is shown by the plaintiff. ***Woods v. Helmi,*** 758 S.W.2d 219, 224 (Tenn. App. 1988); ***Southern Ice Co.,*** 136 Tenn. at 401. Once privileged, the statement is presumed to have been made without malice, and the burden is on the plaintiff to prove express malice. ***Langford v. Vanderbilt University,*** 318 S.W.2d 568, 576 (Tenn. App. 1958). To prove actual malice, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication, and that publishing, with such doubt, shows reckless disregard for truth or falsity and demonstrates actual malice. ***Moore v. Bailey,*** 628 S.W.2d 431, 433-4 (Tenn. App. 1981).

The record does not show any actual malice on the part of the defendants. As we stated above, the record does not even show any negligence, much less any malice or reckless disregard for the truth. There is no evidence that the defendants entertained serious doubts or acted with actual malice. We hold that the statements by the defendants identifying the plaintiff, both orally and written, are conditionally privileged under a public interest privilege and, therefore, are not actionable.

V.

The plaintiff also claims that the defendants were negligent regardless of any defamatory statement. However, the trial court granted summary judgment for the defendants partly on the basis that there was no act of commission or omission which constituted negligence as a matter of law. The record does not establish any negligence on the part of the defendants. For the reasons stated above, we believe that the trial court was correct in granting summary judgment because there was no negligent act. Our holding today pretermits the issue of whether the actions of St. Francis Hospital and St. Francis employees were superseding, intervening acts.

Accordingly, the order of the trial court granting summary judgment to defendants, Service Merchandise, Co., Inc., Michael Thomas, Lisa Duncan, and Velma Wilson is affirmed. Costs of this appeal are assessed against the appellant.

/s/ Crawford
W. FRANK CRAWFORD
PRESIDING JUDGE, W.S.

CONCUR:

/s/ Farmer
DAVID R. FARMER, JUDGE

/s/ Holly K Lillard
HOLLY KIRBY LILLARD, JUDGE

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

BERTHA L. PATE,

Plaintiff-Appellant,

Vs.

SERVICE MERCHANDISE CO., INC., MICHAEL THOMAS, MANAGER, LISA DUNCAN, VELMA WILSON,

Defendants-Appellees.

Circuit Law No. 38960 T.D.
C.A. No. 02A01-9505-CV-00112

JUDGMENT

(Filed Sep. 26, 1996)

This cause came on to be regularly considered by the Court on the record and for the reasons stated in the Court's Opinion, of even date, it is ordered that:

1. The order of the trial court granting summary judgment to defendants, Service Merchandise, Co., Inc., Michael Thomas, Lisa Duncan, and Velma Wilson, is affirmed.

2. Costs of the appeal are assessed against the appellant for which execution may issue, if necessary.

/s/ Crawford
W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.

/s/ Farmer
DAVID R. FARMER, JUDGE

/s/ Holly K Lillard
HOLLY KIRBY LILLARD,
JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

BERTHA L. PATE	)	
	)	NO.
v.	)	02-A-01-9505-
	)	CV-00112
SERVICE MERCHANDISE	)	
COMPANY, INC., MICHAEL	)	SHELBY COUNTY
THOMAS, MANAGER, LISA	)	
DUNCAN, VELMA WILSON	)	

ORDER

(Filed Mar. 17, 1997)

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be, and is, hereby, denied.

PER CURIAM

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

BERTHA L. PATE,

Plaintiff-Appellant,

Vs.

SERVICE MERCHANDISE CO., INC., MICHAEL THOMAS, MANAGER, LISA DUNCAN, VELMA WILSON,

Defendants-Appellees.

Circuit Law No. 38960 T.D.
C.A. No. 02A01-9505-CV-00112

ORDER
(Filed Oct. 23, 1996)

Appellant has filed a petition to rehear which avers in essence that the Court was in error in stating in the opinion that "the record establishes that no surveillance cameras were in place in either the electronics department (where the transaction took place) or the customer pick-up area (where the purchaser receives the goods purchased) on the date of the alleged transaction."

Appellant asserts that the affidavit and deposition of the store manager, Michael Thomas, that established this fact is controverted by the affidavit of John Leach, one of appellant's attorneys. Appellant asserts that the Leach affidavit establishes that the appellees' attorney admitted that there was a surveillance tape in the involved area by

stating to him that the January 2, 1991 tape had been "rolled over" and was not available.

We must respectfully disagree that the Leach affidavit controverts the affidavit and deposition of Michael Thomas that there were no surveillance cameras in the customer pick-up area on the date involved. The appellees admitted that there were surveillance cameras in the jewelry department on that date, but that was the only location of such cameras in the store. We do not view the Leach affidavit as controverting the Thomas testimony.

Moreover, as we noted in the opinion, the employees involved had no doubt about their identification, and under these circumstances their failure to retrieve and review a surveillance film does not indicate lack of reasonable care.

Accordingly, appellant's petition to rehear is denied.

/s/ Crawford
W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.

/s/ Farmer
DAVID R. FARMER, JUDGE

/s/ Holly K Lillard
HOLLY KIRBY LILLARD, JUDGE

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS

BERTHA L. PATE,

Plaintiff,

No. 38960 T.D.-6

vs.

SERVICE MERCHANDISE CO., INC., MICHAEL THOMAS, MANAGER, LISA DUNCAN, and VELMA WILSON,

Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGEMENT OF DEFENDANTS SERVICE MERCHANDISE CO., INC., MICHAEL THOMAS, LISA DUNCAN AND VELMA WILSON

This cause came to be heard upon the Motion for Summary Judgement of Defendants Service Merchandise Co., Inc., Michael Thomas, Lisa Duncan and Velma Wilson, upon the memorandum of law of the parties, upon the statements and argument of counsel, upon the depositions taken and available to the Court, namely Dan Melancon, Lt. Booze, Laverne Luton, Robert Halford, Rita Schroeder, Michael Thomas, Lisa Duncan, Velma Wilson, Lt. Hunt, Sgt. McKee, Bertha Pate and the exhibits there to, and upon the entire record in this cause, from all of which the Court finds that:

1. There was no statement, oral or written, that constitutes defamation of the Plaintiff, either slander or libel, as a matter of law; and

2. There was no act of commission or omission by Defendants which constitutes negligence as a matter of law, and, therefore the Court concludes that there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion of Defendants Service Merchandise Co., Inc., Michael Thomas, Lisa Duncan and Velma Wilson for Summary Judgement be and hereby is granted;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this case be and the same is hereby dismissed with prejudice at the cost of the Plaintiff, for which execution may issue if necessary.

GEORGE H. BROWN, JR.
Hon. George H. Brown, Jr.
Judge-Division VI

2/27/95
Date

Approved:

/s/ John W. Leach
John W. Leach

/s/ George E. Skouteris
George E. Skouteris
Attorneys for Plaintiff

A TRUE COPY ATTEST
JIMMY MOORE, Clerk
/s/ M L Martin

Gail O. Mathes
Attorney for Defendants

CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing has been served, U. S. Mail, postage prepaid, upon all interested parties this the 9 day of January, 1995.

/s/ John W. Leach
John W. Leach

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Article III, § 2, clause 1.

The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . . "

28 USC, § 1257.

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

U.S. Constitution, Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

B2

MEMPHIS PUBLISHING CO., Petitioner,

v.

Ruth Ann NICHOLS and Bobby Lee Nichols, Respondents.

Supreme Court of Tennessee.

July 31, 1978.

Married couple filed separate actions against newspaper, charging defamation and invasion of privacy. The actions were consolidated for trial, and the Law Court, Shelby County, John R. McCarroll, Jr., J., granted the newspaper's motion for a directed verdict. Plaintiffs appealed, and the Court of Appeals reversed and remanded for a new trial. Certiorari was granted, and the Supreme Court, Brock J., held that: (1) the ordinary negligence standard was applicable to defamation actions brought by private persons against media defendants; (2) in determining the issue of liability, the conduct of the defendant newspaper was to be measured against what a reasonably prudent person would or would not have done under the same or similar circumstances; (3) where the newspaper article concerning plaintiffs, when read and construed in the sense in which a reader would ordinarily understand it, carried a clear implication that the female plaintiff was involved in an adulterous relationship, there was a question as to whether the newspaper exercised reasonable care and caution in checking on the truth or falsity and the defamatory character of the article before publishing it; (4) where the published statement so distorted the truth as to make the entire article false and defamatory, it was no defense whatever that individual statements within the article were literally

true, and (5) the printing of the article did not give rise to a cause of action for invasion of privacy.

Remanded in part and dismissed in part.

Leo Bearman, Jr., Memphis, for petitioner.

Richard J. Ryan, Sr., Richard Joseph Ryan, Jr., Nancy E. Ryan, Memphis, for respondents.

OPINION

BROCK, Justice.

On June 5, 1971, the following news article appeared in the *Memphis Press-Scimitar*:

"WOMAN HURT

BY GUNSHOT

"Mrs. Ruth A. Nichols, 164 Eastview, was treated at St. Joseph Hospital for a bullet wound in her arm after a shooting at her home, police said.

"A 40-year-old woman was held by police in connection with the shooting with a .22 rifle. Police said a shot was also fired at the suspect's husband.

"Officers said the incident took place Thursday night after the suspect arrived at the Nichols home and found her husband there with Mrs. Nichols.

"Witnesses said the suspect first fired a shot at her husband and then at Mrs. Nichols, striking her in the arm, police reported.

"No charges had been placed."

Ruth Ann Nichols and her husband, Bobby Lee Nichols, filed separate actions, which were consolidated for trial, charging defamation and an invasion of privacy. The crux of plaintiffs' charge is that the article published by the defendant falsely implied that Mrs. Nichols and Mr. Newton, the assailant's husband, were having an adulterous affair, and were "caught" by Mrs. Newton. Plaintiffs charged that "at the time of the publication of the said article the defendant knew, or could have known had it exercised reasonable care, and could have ascertained that the said matters were untrue."

The undisputed proof showed that not only were Mrs. Nichols and Mr. Newton at the Nichols' home but so, also, were Mr. Nichols and two neighbors, all of whom were sitting in the living room, talking, when Mrs. Newton arrived around three o'clock in the afternoon. Hearing a commotion, Mr. Newton went outside to investigate and there his wife fired several shots at him. Mr. Newton then ran behind the Nichols' home whereupon Mrs. Newton entered the house and shot Mrs. Nichols.

A *Memphis Press-Scimitar* reporter, Menno Duerksen, testified that he had written the article in question two days before it was published and that it was his practice to go to the police station about 4:30 a. m. each day to read through the reports in search of a story. Two police reports were written regarding the shooting incident at the Nichols' home although the availability of both reports at the time Mr. Duerksen wrote his story was disputed. The *arrest report* made no mention of any individuals at the scene of the shooting other than Mrs. Nichols, Mr. Newton and Mrs. Newton. The *offense report* included information that Mr. Nichols and two neighbors

were also at the house when Mrs. Newton arrived. Both reports indicated that the incident took place in the middle of the afternoon.

Mr. Duerksen testified that "police said" and "police reported," terms he had used in his story, were commonly used by reporters to indicate *either* that the source of quoted information was a direct quote from a police officer *or* that the information was gathered from official police reports. Police officers testified that they had not given an oral interview regarding the incident.

The proof showed that the defendant newspaper printed a follow-up of the incident on July 2, 1971, stating that an assault charge against Mrs. Newton had been dismissed and that the newspaper's original account of the incident had regrettably failed to state that Mr. Nichols was present and had tried to prevent the shooting.

Mrs. Nichols testified at trial that "[t]he article in the paper has tore up my home and has tore up my children. We had to move. It's tore up my reputation. My friends has turned down on me. People has talked about me. They've talked about my husband. They've talked about my children." She testified that she had changed her telephone number four times because of harassing phone calls she received. "They would call me and say, 'Oh, you finally got caught.' Said, 'How much did they charge – how much did it cost your husband to get the re-writeup in the paper or get the retraction wrote up?' "

One of Mr. Nichols' friends and fellow workers testified that people would talk about Mrs. Nichols. In response to the question of what people said about Mr.

Nichols' wife, the witness stated "They said she was a whore."

At the close of all the proof the trial court granted the defendant's motion for a directed verdict on grounds that (1) the matter was not "libel by innuendo," (2) no "fault" had been shown, and (3) that no special damages had been proved. The court indicated uncertainty respecting the correct standard of liability for a newspaper alleged to have defamed a "private" person, in light of the United States Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

The Court of Appeals reversed and remanded for a new trial, holding (1) that T.C.A. § 23-2601 had obviated the need for special damages where the defendant had published an imputation of adultery, (2) that the determination of whether the article was "libelous per se by innuendo" was a question for the jury, (3) that the standard of liability was ordinary care and (4) that there was evidence adduced at the trial from which a jury could find that the defendant did not act with reasonable care under the circumstances. The case was remanded for a new trial.

We granted certiorari to consider the effect of the *Gertz* decision upon the law of libel in this state and its application to this case.

I

Before the decision in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), libelous statements were considered to be undeserving of first

amendment protection. The libel laws of the individual states traditionally had consisted of common-law principles. In *New York Times,* however, the Court departed from the common law, holding that the first amendment protected good-faith critics of the official conduct of public officials from defamation suits:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279, 84 S.Ct. at 726.

In *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) the *New York Times* doctrine was extended to defamation of "public figures" involved in "public issues." In *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), the Court, in a plurality opinion, concluded that the *New York Times* standard of liability also applied in libel actions by "private" individuals against publishers of defamatory statements relating to matters of "public or general concern."

However, in *Gertz v. Robert Welch, Inc., supra,* a majority of the Court concluded that the *Rosenbloom* plurality had extended the constitutional privilege too far and had failed to strike a proper balance between the reputation interests of private individuals and the interests protected by the first amendment. Although the Court did not mandate that the states must abandon the "actual malice" requirement in actions by private individuals, it did hold that

> " . . . so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual." 418 U.S. at 347, 94 S.Ct. at 3010.

The Court reasoned that "[t]his approach provides a more equitable boundary between the competing concerns involved," and "recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation." *Id.* at 347-48, 94 S.Ct. at 3011. The effect of the Court's holding is to approve an ordinary negligence standard of liability in such cases as one that complies with the requirements of the first and fourteenth amendments.

Moreover, the Court concluded that common-law rules which permit recovery of presumed damages to reputation and the award of punitive damages unduly infringed upon first amendment freedoms.

Concerning presumed damages the Court said:

> "For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.
>
> "The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries

may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury. . . . It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." 418 U.S. at 349-50, 94 S.Ct. at 3011.

Likewise, the Court banned recovery of punitive damages unless actual malice is shown:

"We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury." 418 U.S. at 350, 94 S.Ct. at 3012.

In *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976), the Court further clarified the applicability of the *Gertz* damage principles. In *Firestone* the Court allowed recovery for mental pain and anguish as the result of the publication of a false statement even though plaintiff had withdrawn her claim for damages to reputation.

II

The *Gertz* decision permits each of the states to fashion a rule of liability based upon fault that is less than actual malice, so long as it does not impose liability without fault, to govern actions of libel by "private" individuals against media defendants.[1] Some states have continued to apply the actual malice test,[2] while others have adopted an ordinary negligence test,[3] and still others appear to have chosen some kind of middle ground.[4]

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[1] In this case, plaintiff is neither a "public official" nor a "public figure." She holds no public office, does not have general fame or notoriety in the community, has no pervasive involvement in public affairs and has not injected herself into a public controversy.

[2] *E. g., Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450 (1975); *AAFCO Heating & Air Conditioning Co. v. Northwest Pub., Inc.*, 321 N.E.2d 580 (Ind.App.1975), *cert. denied*, 424 U.S. 913, 96 S.Ct. 1112, 47 L.Ed.2d 318 (1976).

[3] *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P.2d 1216 (1977); *Corbett v. Register Pub. Co.*, 33 Conn.Sup. 4, 356 A.2d 472 (1975); *Cahill v. Hawaiian Paradise Park Corp.*, 56 Haw. 522, 543 P.2d 1356 (1975); *Troman v. Wood*, 62 Ill.2d 184, 340 N.E.2d 292 (1975); *Gobin v. Globe Pub. Co.*, 216 Kan. 223, 531 P.2d 76 (1975); *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161 (1975); *Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co.*, 43 Ohio App.2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okl.1976); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex.1976); *Taskett v. King Broadcasting Co.*, 86 Wash.2d 439, 546 P.2d 81 (1976).

[4] *E. g. Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 379 N.Y.S.2d 61, 341 N.E.2d 569 (1975) (gross negligence).

The overwhelming response to *Gertz*, however, has been to adopt the test settled upon by the Court of Appeals in this case, *i. e.*, an ordinary negligence standard. As the Kansas Supreme Court said in *Gobin v. Globe Pub. Co.*, 216 Kan. 223, 232, 531 P.2d 76, 83 (1975):

> "[P]ersons are generally held accountable for their negligence – the lack of ordinary care either in the doing of an act or in the failure to do something. The whole theory of negligence presupposes some uniform standard of behavior for the protection of others from harm. The norm usually is the conduct of the reasonably careful person under the circumstances."

See also *Restatement (Second) of Torts* § 580B (1977).

In our opinion, there are manifold reasons for adopting the negligence standard. Among these is the fact that the *Gertz* decision points to this result. In *Gertz*, emphasis is placed upon the need to balance freedom of the press with the private individual's right to protection of his reputation. The *New York Times* test of actual malice strikes this balance where public officials or figures are concerned. This conclusion is based on the Court's characterization of public figures as persons who are uniquely able to protect themselves through public rebuttal, and as persons who knowingly expose themselves to an increased risk of defamation. Private individuals, in the opinion of the Supreme Court, "are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." 418 U.S. at 345, 94 S.Ct. at 3010.

In drawing this distinction, *Gertz* makes it clear that the actual malice test would weight this balance too heavily in favor of the press:

> "[W]e believe that the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. For the reasons stated below, we conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them." 418 U.S. at 343, 94 S.Ct. at 3008-09.

One of the arguments used by opponents of the negligence test is that it will subject editors and publishers to such exacting self-scrutiny that it will have a chilling effect upon the constitutional interest in a free, robust flow of information to the public. *E. g., AAFCO Heating and Air Conditioning Co. v. Northwest Publishing, supra.* Obviously, this conclusion is contrary to that reached in *Gertz, i. e.,* that a standard more stringent for the publisher than actual malice is entirely proper to protect both competing interests. *Troman v. Wood, supra,* 340 N.E.2d at 297. Moreover, the overwhelming majority of state courts considering this issue have concluded that no undue chilling effect or self-censorship would result. As was said in *Taskett v. King Broadcasting Co., supra,* 546 P.2d at 86:

> "It is true that greater caution must now be exercised where the subject of a publication is a private person, yet such a rule is totally justifiable in light of the state's overriding interest in providing a realistic remedy to an otherwise helpless private citizen. It cannot be gainsaid

> that any social value derived through a defamatory falsehood pertaining to a truly private individual is 'clearly outweighed by the social interest in order and morality.' "

It is our conclusion that the ordinary negligence standard permitted by *Gertz* for all defamation actions brought by private persons against media defendants, is the only standard of liability that achieves the desired accommodation of first amendment guarantees and the interest in protecting individual reputation. Only this standard "recognizes that the special needs of the private plaintiff require a more stringent standard of liability than is imposed when the plaintiff is a public figure or official who has ready media access and has voluntarily assumed the risk of defamatory comment by placing himself in the public eye." Note, *State Court Reactions to Gertz v. Robert Welch, Inc.*, 29 Vand.L.Rev. 1431, 1444 (1976).

In determining the issue of liability the conduct of the defendant is to be measured against what a reasonably prudent person would, or would not, have done under the same or similar circumstances. This is the ordinary negligence test that we adopt, not a "journalistic malpractice" test whereby liability is based upon a departure from supposed standards of care set by publishers themselves. *See Troman v. Wood, supra.*

In our opinion, the appropriate question to be determined from a preponderance of the evidence is whether the defendant exercised reasonable care and caution in checking on the truth or falsity and the defamatory character of the communication before publishing it. In answering the question, the jury may rely on its own

experience and instincts to determine whether an ordinarily prudent person would have behaved as the defendant did.

III

Under the common law as applied in this state prior to the *Gertz* decision, defamations were classified as either actionable *per se* or *per quod*. The primary distinction between libel *per se* and libel *per quod* lay in the nineteenth-century development requiring special damages to be plead and proved in libel actions unless the defamatory meaning of the words was apparent on their face.[5] *See Fry v. McCord Bros.*, 95 Tenn. 678, 33 S.W. 568 (1895); *Continental National Bank of Memphis v. Bowdre Bros.*, 92 Tenn. 723, 23 S.W. 131 (1893); Note, *Libel Per Se and Special Damages*, 13 Vand.L.Rev. 730 (1960). Any libel which was defamatory on its face, *i. e.*, the danger of injury to reputation was apparent from the mere words themselves, has been held to be actionable *per se*. In such cases actual injury has been conclusively presumed by the court.

Words which were defamatory only in the light of certain extrinsic facts[6] were said to be libelous *per quod*.

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[5] See Prosser, *Libel Per Quod*, 46 Va.L.Rev. 839 (1960). *See also* Prosser, *More Libel Per Quod*, 79 Harv.L.Rev. 1629 (1966); Eldredge, *The Spurious Rule of Libel Per Quod*, 79 Harv.L.Rev. 733 (1966).

[6] The extrinsic facts must be plead by way of the "inducement" and the defamatory meaning with reference to those facts by way of the "innuendo." The allegation showing

See Fry v. McCord Bros., supra, 95 Tenn. at 685, 33 S.W. 568. In the classic case of libel *per quod* the defendant's newspaper falsely published a report that the plaintiff had given birth to twins. Such publication was defamatory in light of the fact that the plaintiff had been married only one month. *Morrison v. Ritchie & Co.,* 39 Scot.L.Rep. 432 (1902).

Since *Gertz* has held that presumed damages are no longer permissible, the *per se/per quod* distinction no longer has any practical meaning. "A uniform requirement for proof of actual damages obliterates these often illogical distinctions, most of them relics from centuries past." Eaton, *The American Law of Defamation Through Gertz v. Robert Welch and Beyond,* 61 Va.L.Rev. 1349, 1434 (1975). We hold, therefore, that the *per se/per quod* distinction is no longer a viable one. The plaintiff must plead and prove injury from the alleged defamatory words, whether their defamatory meaning be obvious or not.

IV

Whether the news article published by the defendant newspaper concerning the shooting episode at the Nichols' home was, in fact, understood by readers in its

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that the language is directed against the plaintiff is the "colloquium."

The word "innuendo" has been a source of confusion in the law of defamation. Frequently, it has been improperly used in its generic sense as the meaning of the inference which may be properly drawn from the words complained of. *See* Eldredge, *Practical Problems in Preparation and Trial of Libel Cases,* 15 Vand.L.Rev. 1085, 1089 (1962).

defamatory sense is ultimately a question for the jury. But preliminary determination of whether the article is *capable* of being so understood is a question of law to be determined by the court. *See Restatement (Second) of Torts* § 614 (1977); *Williams v. McKee*, 98 Tenn. 139, 38 S.W. 730 (1897); *Langford v. Vanderbilt Univ.*, 44 Tenn.App. 694, 318 S.W.2d 568 (1959); 50 Am.Jur.2d *Libel and Slander* § 22 (1970). In our opinion, defendant-newspaper's motion for a directed verdict in this case must be resolved in favor of Mrs. Nichols. When read and construed in the sense in which the reader would ordinarily understand it, the clear implication of the article is that Mrs. Nichols and Mr. Newton had an adulterous relationship and were discovered by Mrs. Newton, thus precipitating the shooting incident. If so read, it can hardly be doubted that Mrs. Nichols' reputation would be injured.[7]

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[7] The courts of this state have consistently followed the prevailing common-law practice of construing the allegedly libelous words in their "plain and natural" import. See, *e. g.*, *Continental Nat'l Bank of Memphis v. Bowdre Bros.*, *supra*; *Fry v. McCord Bros.*, *supra*. Other jurisdictions have followed the seventeenth-century English doctrine of *Mitior sensu*, applicable to slander, which required that words be given an innocent construction whenever humanly possible. *See, e. g., John v. Tribune Co.*, 24 Ill.2d 437, 181 N.E.2d 105 (1962), *cert. denied*, 371 U.S. 877, 83 S.Ct. 148, 9 L.Ed.2d 114 (1962); *Johnson v. Campbell*, 91 Ohio App. 483, 108 N.E.2d 749 (1952); *Tulas Tribune Co. v. Kight*, 174 Okl. 359, 50 P.2d 350 (1935); *Ruble v. Kirkwood*, 125 Or. 316, 266 P. 252 (1928); *Manley v. Harer*, 73 Mont. 253, 235 P. 757 (1925); *Dalton v. Woodward*, 134 Neb. 915, 280 N.W. 215 (1938); *Ellsworth v. Martindale Hubbell Law Directory*, 66 N.D. 578, 268 N.W. 400 (1936).

The art of construing in *Mitior sensu* probably reached its zenith (or perhaps its nadir) in the famous case of *Holt v.*

In libel actions the burden of proof rests upon the plaintiff to show defamation and prove damages. He need not show, however, that the statement is false. There is a legal presumption of falsity which the defendant may rebut by proving truth as a defense.

In this case, the defendant newspaper does not assert that Mrs. Nichols and Mr. Newton in truth had an adulterous relationship. Nevertheless, the defendant's principal defense is that all material facts stated in the news article were substantially true, emphasizing in its brief:

> *"IT IS OF CRUCIAL IMPORTANCE TO NOTE THAT THE RECORD REFLECTS THAT EVERY MATERIAL FACT IN THE ARTICLE QUOTED ABOVE WAS TRUE.*
>
> * * *
>
> "Mrs. Nichols *was in fact* treated at St. Joseph Hospital for a bullet wound in her arm after the shooting. A 40-year old woman *was in fact* held by police in connection with the shooting. A shot *was in fact* fired at the suspect's husband. The suspect *did in fact* find her husband at the Nichols' home with Mrs. Nichols. The suspect *did in fact* fire a shot at her husband and then at Mrs. Nichols and *did in fact* strike her in the arm.

Astrigg, 79 Eng.Rep. 161 (1608). In that case the allegedly slanderous language was: "Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved his head; the one part lay on the one shoulder, and another part on the other." The court held that this was not slanderous *per se* because "it is not averred that the cook was killed . . . [N]otwithstanding such wounding, the party may yet be living; and it is then but trespass." The court was of the opinion that slander "ought to be direct."

> No charges *had in fact* been placed at the time of the writing of the article."

In our opinion, the defendant's reliance on the truth of the facts stated in the article in question is misplaced. The proper question is whether the *meaning* reasonably conveyed by the published words is defamatory, "whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Fleckenstein v. Friedman*, 266 N.Y. 19, 23, 193 N.E. 537, 538 (1937). *See Lawlor v. Gallagher Presidents Report, Inc.*, 394 F.Supp. 721 (S.D.N.Y.1975). The publication of the complete facts could not conceivably have led the reader to conclude that Mrs. Nichols and Mr. Newton had an adulterous relationship. The published statement, therefore, so distorted the truth as to make the entire article false and defamatory. It is no defense whatever that individual statements within the article were literally true. Truth is available as an absolute defense only when the defamatory meaning conveyed by the words is true. *See Brown v. First National Bank*, 193 N.W.2d 547, 553 (Iowa 1972).

V

Under the common law not only was published defamatory matter "presumed" to be untrue but, in many cases, it was "presumed" that the plaintiff suffered damage, even though he proved none and though in fact none may have existed. *See* W. Prosser, *The Law of Torts* §§ 113, 116 (4th ed. 1971).

Before the *Gertz* decision, our common law provided that if the plaintiff prevailed in a libel *per se* action, the

jury could award "general" damages to compensate the defamed plaintiff for any proven injury to his reputation, or, in the absence of proof of *actual* injury, could award compensation for the *presumed* injury (including general injury to reputation, personal humiliation, and actual pecuniary loss that could not be specifically proven) which normally would be expected to result from the publication of the statement. *See Fry v. McCord Bros., supra,* 95 Tenn. at 684, 33 S.W. at 570. If proven, "special damages,"[8] such as specific economic or material loss resulting from the defamatory statement could also be awarded to a plaintiff entitled to general damages. And, upon a finding that the statement was published with actual malice, punitive damages could be assessed. *See generally,* D. Dobbs, *The Law of Remedies* § 7.2 (1973).

T.C.A., § 23-2605, requires a plaintiff in a libel action to notify a defendant newspaper or periodical of the alleged defamatory statements and provides:

> "If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of facts, and that there were reasonable grounds for believing that the statements in said article were true, and that . . . a full and fair correction, apology, or retraction was published . . . then the plaintiff shall recover only actual, and not punitive, damages. . . . "

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[8] As mentioned above, special damages are most significant in a case of libel *per quod*. In such cases, the plaintiff has no cause of action at all unless he can prove special damages. If special damages are proven, the plaintiff may then recover general damages.

Now, however, as we have noted, *supra*, *Gertz* restricts damages to compensation for "actual injury," and unless "actual malice" is shown, punitive damages are not to be permitted and compensatory damages must be proved, not presumed.

In light of the conclusions we have reached, Mrs. Nichols' libel suit is remanded to the trial court for a new trial. Mr. Nichols' suit for libel is dismissed. Both invasion of privacy actions are dismissed as being without merit. *See* Note, *The Invasion of Privacy by Defamation*, 23 Stan.L.Rev. 547 (1971). Costs are taxed against petitioner.

HENRY, C. J., and FONES, COOPER and HARBISON, JJ., concur.

PRESS, INC. d/b/a the Johnson City Press Chronicle, et al., Petitioners,

v.

Sherry L. VERRAN, Respondent.

Supreme Court of Tennessee.

July 31, 1978.

In a libel action, the Law Court, Washington County, Jack R. Musick, J., sustained publisher's motion for summary judgment, holding that plaintiff was a public official and a public figure within the meaning of the libel laws and that there was no proof of actual malice. The Court of Appeals reversed, holding that plaintiff was neither a public official nor a public figure, and certiorari was granted. The Supreme Court, Henry, C. J., held that plaintiff, a junior social worker in county office of State Department of Human Services who had sufficient power to remove or cause children to be taken from parents' custody and placed in foster home and to lay down conditions fraught with financial, physical and psychological problems, was a public figure or official under law of libel.

Judgment of Court of Appeals reversed and cause remanded.

C. T. Herndon, III, Herndon, Coleman, Brading & McKee, J. Frank Bryant, Johnson City, for petitioners.

Richard W. Pectol, Johnson City, for respondent.

OPINION

HENRY, Chief Justice.

We granted certiorari in this action of libel to consider the extent of a publisher's constitutional privilege against liability for defamation. We focus on the specific issue of whether plaintiff is a "public official" or a "public figure" under the law of libel as it has developed under recent decisions of the Supreme Court of the United States.[1]

The trial judge sustained the motion of petitioner for summary judgment, holding that respondent, a junior social worker in the Washington County office of the State Department of Human Services, was a public official and a public figure within the meaning of the libel laws and that there was no proof of actual malice, nor any "indication of any reckless disregard for the truth or falsity of the matters printed." The Court of Appeals reversed, holding that plaintiff was neither a public official nor a public figure and only a negligence test applied against the publisher.[2]

We granted the writ in order to analyze the status of the plaintiff. We conclude that the Court of Appeals reached an erroneous conclusion and, accordingly, reverse.

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[1] The status of the libelled party is the only issue raised by the assignments of error.

[2] Our recent case of *Memphis Publishing Co. v. Nichols, Tenn.*, 569 S.W.2d 412 (1978), disposes of the question of the correct standard. This issue is not before the Court in this case.

I.

The defendants to this action are Press, Inc., the publisher of the Johnson City *Press Chronicle*, a daily newspaper, one of its stockholders (presumably the chief executive or manager), and two of its bureau chiefs.

This action grew out of a series of ten articles appearing in the *Chronicle*, at periodic intervals from July 2, 1975, through September 3, 1975, all relating to the actions and activities of plaintiff in connection with the performance of her official duties. None related to her conduct as a private citizen.

On April 1, 1975, plaintiff received a telephone call from a school principal suggesting that some of the ten children of Elmer and Mary Tolley were the victims of child abuse. Pursuant to § 37-1206, T.C.A., plaintiff conducted an investigation during the course of which she visited the Tolley residence in a remote rural section, interviewed Mrs. Tolley, observed the children and arranged for them to be examined by a medical doctor.

The medical examination indicated signs of abuse and plaintiff recommended to her supervisor that the children be placed in foster homes pursuant to § 37-1201, et seq., T.C.A. After approval by her supervisor and the legal staff of the Department, she completed the proper documents for submission to the Juvenile Judge, who ordered the children placed in foster homes. Plaintiff accompanied law enforcement officials to the Tolley residence and aided in the removal of the children. Soon thereafter, she met in her office with the Tolleys, who came in an effort to determine how they could get their children back.

According to the newspaper publications, among the requirements for the return of the children was that Mrs. Tolley submit to a bilateral tubal ligation. This condition was reported by the Tolleys to the *Chronicle*, which, after investigating the matter, ran the series of articles featuring the charge that Mrs. Tolley was "coerced into submitting to sterilization" in order to procure the return of her children.

When the *Chronicle* declined to make a retraction, this suit was filed.

It should be reiterated that while other issues are framed by the pleadings the only question presented to us for determination is whether plaintiff is a "public official" or "public figure." Nothing in this opinion is to be construed as holding that the complaint states a cause of action, or as resolving any other issue.

II.

An analysis of the issues involved in this controversy must start with the landmark case of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), wherein the Supreme Court, considering the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open," fashioned a new rule of "constitutional privilege":

> The constitutional guarantees require, we think, a federal rule that prohibits a *public official* from recovering damages for a defamatory falsehood relating to his *official conduct* unless he proves that the statement was made with

> "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not. (Emphasis supplied). 376 U.S. at 279-280, 84 S.Ct. at 726, 11 L.Ed.2d at 706.

The Court bottoms this rule upon the First Amendment guarantee of freedom of speech and of the press, made applicable to the states by the Fourteenth Amendment. While the Court applied the new rule to defamatory publications involving the "official conduct" of a "public official," it did not define the term "public official" nor determine how far down into the lower ranks of government employees the "public official" designation would extend, nor did it determine the boundaries of the "official conduct" concept.

Two years later, however, in *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966), the Court undertook a definition of the term "public official":

> [T]he "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. 383 U.S. at 85, 86 S.Ct. at 676, 15 L.Ed.2d at 605.

In 1967, the case of *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, came before the Supreme Court. When the various opinions by the Court are analyzed, it becomes evident that the constitutional privilege was extended to "public figures" along with "public officials." The plurality opinion suggests that a public figure is one who

> may have attained that status by position alone . . . [or] by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy, but . . . commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements. 388 U.S. at 155, 87 S.Ct. at 1991, 18 L.Ed.2d at 1111.

Here, the volition of the injured was a critical consideration.

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), "[t]he Court was sadly fractionated,"[3] and could not agree on an opinion. Justice Brennan wrote for a plurality of three. In effect the plurality held that the status of the individual was not the controlling consideration; instead the test was whether there was involved an issue of "public or general interest." 403 U.S. at 44, 91 S.Ct. at 1820, 29 L.Ed.2d at 312. The effect of this holding was to extend the *New York Times* "knowledge-or-reckless disregard" rule to any issue of public interest. The Court said:

> If a matter is a subject of *public or general* interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant

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[3] *Gertz v. Robert Welch, Inc., infra*, 418 U.S. at 354, 94 S.Ct. at 3014, 41 L.Ed.2d at 813.

> and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety. (Emphasis supplied.) 403 U.S. at 43, 91 S.Ct. at 1819, 29 L.Ed.2d at 311.

Thus, the Court abandoned the status of the individual test. The fragile foundation of *Rosenbloom* endured for only three years.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Supreme Court retreated from the plurality position of *Rosenbloom* and declined to extend the New York Times privilege to defamation of private individuals, even though a matter of public interest was involved. The Court's rationale is evident from this quotation from the opinion:

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.
>
> * * *
>
> Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly,

> those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment. 418 U.S. at 344-345, 94 S.Ct. at 3009, 41 L.Ed.2d at 808.

After pointing out that the media may assume that public officials and public figures have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood," the Court further amplified the theme of the protection of private individuals thusly:

> No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an "influential role in ordering society." (Citation omitted). He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery. 418 U.S. at 345, 94 S.Ct. at 3010, 41 L.Ed.2d at 808.

The Court declared that "the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them." 418 U.S. at 343, 94 S.Ct. at 3008-3009, 41 L.Ed.2d at 807. Following this rationale, the Court specifically authorized the states to "define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood" but only "so long as they do not impose liability without fault." 418 U.S. at 347, 94

S.Ct. at 3010, 41 L.Ed.2d at 809. Our recent case of *Memphis Publishing Company v. Nichols, Tenn.*, 569 S.W.2d 412 (Tenn.1978), quotes and follows this authorization. *Memphis Publishing Company* establishes standards for suits by private individuals and has no application to those involving public officers or public figures, acting in their official capacities.

With respect to the term "public figure", the Court in *Gertz*, gives substantial guidance:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is *drawn into* a particular public controversy and thereby becomes a public figure for a *limited range of issues*. In either case such persons assume special prominence in the resolution of public questions. (Emphasis supplied.)
>
> * * *
>
> Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by *looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation*. (Emphasis supplied.) 418 U.S. at 351-352, 94 S.Ct. at 3013, 41 L.Ed.2d at 812.

The Court, however, provided no significant guidance on the meaning of "public controversy."

The major effect of *Gertz* was to provide greater protection for the reputational interests of private individuals.

This trend was followed and the meaning of the term "public figure" was further amplified in *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976), and, in so doing, the Court instructed us as to what is not a public controversy.

There the underlying controversy was a divorce action between Russell Firestone, "the scion of one of America's wealthier industrial families," and his wife, Mary Alice Firestone, a case referred to by the Florida Supreme Court as a *cause célèbre*.[4] An ambiguous divorce decree was entered and *Time Magazine* reported that the divorce was awarded to the husband on the basis of the wife's extreme cruelty and adultery.

Time contended before the Supreme Court that the divorce action was a "public controversy" and that Mrs. Firestone should be treated as a "public figure." Responding to this, the Court said:

> [P]etitioner seeks to equate "public controversy" with all controversies of interest to the public.

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[4] Mrs. Firestone was "prominent among the '400' of Palm Beach society, and an active (member) of the sporting set, . . . whose activities predictably attracted the attention of a sizable portion of the public." She subscribed to a clipping service and held news conferences during the course of the 17-month trial. The trial drew national coverage and "elicited no fewer than 43 articles in the Miami Herald and 45 articles in the Palm Beach Post and Palm Beach Times." 424 U.S. at 485, 96 S.Ct. at 980, 47 L.Ed.2d at 180-181.

> Were we to accept this reasoning, we would reinstate the doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), which concluded that the New York Times privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In *Gertz*, however, the Court repudiated this position, stating that "extension of the New York Times best proposed by the *Rosenbloom* plurality would abridge [a] legitimate state interest to a degree that we find unacceptable." (Citation omitted.) 424 U.S. at 454, 96 S.Ct. at 965, 47 L.Ed.2d at 163.

The Court held that Mrs. Firestone (a) "did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society"; (b) "did not thrust herself to the forefront of any particular public controversy"; and (c) "assumed no 'special prominence' in the resolution of public questions." Therefore, the Court said she "was not a 'public figure' for the purpose of determining the constitutional protection afforded petitioner's report of the factual and legal basis for her divorce." Further, the Court said that a divorce proceeding "is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." 424 U.S. at 453-455, 96 S.Ct. 965-966, 47 L.Ed.2d at 162-163.

Clearly, in *Firestone* the Court bases its action on the nature and extent of the controversy as opposed to the status of the injured party. *Firestone* makes it clear that an injured party will not be classified as a "public figure"

solely because he or she is deemed newsworthy by the media.

As will be seen from the foregoing analysis, the Supreme Court of the United States has constitutionalized the law of libel and, in material particulars, has preempted state statutory and decisional law in cases and controversies involving the communications media.

There may be no liability without fault, but the more highly placed the individual, the greater is the required degree of fault. The escalating range is from the private individual engaged in private pursuits, whose cause of action is to be tested by conventional negligence standards, up to public officials engaged in public duties, where the "knowledge-or-reckless disregard" rule indicative of actual malice is the constitutional criterion.

Under the *New York Times Rosenblatt – Butts* line of cases a public official or a public figure may not recover in a defamation action from a media defendant in the absence of proof of "actual malice – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The *New York Times* rule is restricted to "official conduct"; however, subsequent cases indicate that involvement in public issues and controversies of interest to the public may be sufficient to trigger the constitutional privilege.

While the term "public official" has not been defined with precision, it causes us no particular concern. Generally the title and nature of the office will provide the answer. However, we find nothing magical, mysterious or mystical in the terminology. The occupant of any position in any branch of government who exercises any public

function is subject to the *New York Times* rule as to all conduct in his official capacity or as to any conduct that might adversely affect his fitness for public office, if he has or "appear[s] to the public to have, substantial responsibilities for or control over the conduct of governmental affairs." *Rosenblatt, supra.*

This does not necessarily apply only to high public position. Any position of employment that carries with it duties and responsibilities affecting the lives, liberty, money or property of a citizen or that may enhance or disrupt his enjoyment of life, his peace and tranquility, or that of his family, is a public office within the meaning of the constitutional privilege.

The term "public figure" has been defined variously by the courts as reference to the above cases will indicate. Included within this classification must be those who have thrust themselves into the vortex of important public controversies; those who achieve such pervasive fame or notoriety that they become public figures for all purposes, and in all contexts; those who voluntarily inject themselves, or are drawn into public controversies, and become public figures for a limited range of issues; and those who assume special prominence in the resolution of public questions. There, no doubt, are other involvements that would invoke the "public figures" designation.

Finally, we think that a critical concern must be the nature and extent of the individual's participation in the particular controversy. See *Gertz, supra.* The status of the individual and the nature and extent of his involvement must be considered in those cases wherein the defamed party is involved in an activity affecting the public, but

may not precisely fit into the pattern of a public official or public figure. It is a fact of life that one may be a public official today, a public figure tomorrow and a nonentity the next. His status must, in the last analysis, be dependent not only upon title or some convenient nomenclature, but also upon the character, nature, purpose, intent and extent of his participation in the particular controversy.

III.

While the law of libel has now been federalized, or at least constitutionalized in substantial part under the federal constitution, we consider the provisions of Tennessee's constitution to be both relevant and significant. Section 19, Article I reads, in pertinent part:

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

To the extent of this controversy this is a substantially stronger provision than that contained in the First Amendment to the Federal Constitution ("Congress shall make no law . . . abridging the freedom . . . of the press") in that it is clear and certain, leaving nothing to conjecture and requiring no interpretation, construction or clarification.

This mandate of Tennessee's Constitution requires that any infringement upon the "free communication of thoughts" and any stumbling block to the complete freedom of the press "to examine [and publish] the proceedings . . . of any branch or officer of the government" is regarded as constitutionally suspect, and at the very threshold there is a presumption against the validity of any such impediment.

But it does not constitutionalize false and malicious defamations, and publishers are answerable for abuse. We equate "abuse of that liberty," as used in our constitution, with the phrase "actual malice" as used in *New York Times*.

IV.

We are impressed with Standards 580A and 580B, Restatement (Second) of Torts (1977). They read as follows:

> § 580A. *Defamation of Public Official or Public Figure.* One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he
>
> (a) knows that the statement is false and that it defames the other person, or
>
> (b) acts in reckless disregard of these matters.
>
> § 580B. *Defamation of Private Person.* One who publishes a false and defamatory communication concerning a private person, or concerning

> a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he
>
> (a) knows that the statement is false and that it defames the other,
>
> (b) acts in reckless disregard of these matters, or
>
> (c) acts negligently in failing to ascertain them.

We believe that these standards meet the criteria of our federal and state constitutions and we adopt them as the law of this jurisdiction.

In adopting these standards, we look to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." We are guided by our belief that the news media have not only a right but a duty to make searching inquiry into all phases of official conduct and to realistically evaluate and assess the performance of duty by public officials.

Only under the most compelling circumstances should the courts place obstacles in the way of the news media, or muzzle or deter their investigative efforts and reporting, even though the end result may be distasteful, despicable and shorn of all sense of fairness. The right of the news media to criticize official conduct is limited solely to their answerability for actual malice, which means that the publication was made with knowledge of its falsity or with reckless disregard for the truth.

Any other standard would have a chilling effect upon one of the most cherished of all the freedoms specified in our bill of rights.

From the days of the lonely pamphleteer operating clandestinely in Colonial America and crying out against the usurpations of the Crown, we have elected to reap the benefits and bear the burdens of a free and courageous press. It may disturb our tranquility; if may vex our peace of mind; it may outrage our sensibilities; it may shock our conscience; and it may even momentarily shake our beliefs in the right of freedom of the press; but so deeply grounded is our national commitment to a free press that we as a nation tolerate its abuses. The *quid pro quo* is that we profit by the very freedom that sometimes causes us to squirm.

It has been said that the fire siren in the nighttime disturbs our slumbers, but it also keeps us from burning up in our beds. So long as we have a free press to focus on false prophets and to expose chicanery and skullduggery within our government, official misconduct will not go undetected or uncorrected. As Mr. Justice Brandeis observed, "sunlight is the most powerful of all disinfectants." See Freund, *The Supreme Court of the United States* 61 (1949). "A responsible press has always been regarded as the handmaiden of effective judicial administration. . . . " *Sheppard v. Maxwell*, 384 U.S. 333, 350, 86 S.Ct. 1507, 1515, 16 L.Ed.2d 600, 613 (1966).

V.

In the instant case the trial judge determined that the respondent was a "public figure or official in at least a

limited sense." He based his conclusion upon the following finding of fact:

> The evidence available to this Court in considering this motion indicates that in this entire matter, beginning with the telephone call from a school official reporting to plaintiff, as a representative of the Tennessee Department of Human Services, a possible case of child abuse; her going to the home of Mr. and Mrs. Tolley to investigate this allegation pursuant to her duty under our code; her taking the children for examination by a physician; her making her own and the physician's recommendation to her supervisor that legal action be taken in the Juvenile Court; her accompanying the officers to take the children from the Tolley home pursuant to the court order; her making herself available to the Tolleys to discuss requirements for return of the children; and in any and all other matters connected with this case, the plaintiff acted in her capacity as a Junior Social Worker employed by a unit of the state government, not in her individual capacity as a private citizen.

We concur in his findings and conclusions. It is true that as a public official she ranks rather low in the hierarchy of state government; however, we do not perceive that the "pecking order" is pertinent. To the Tolleys she had sufficient power to remove or cause their children to be taken from their custody and placed in a foster home, and to lay down conditions fraught with financial, physical and psychological problems. While this action may have been proper in all respects, its employment was unquestionably heady.

To the Tolleys she was the very epitome of government.

VI.

The only issue before us for determination is whether respondent was a public official or public figure. We have made that determination. In the present posture of the lawsuit, we can only reverse the Court of Appeals and affirm so much of the judgment of the trial judge as found respondent to be a public official, within the meaning of the constitutional privilege.

In the interest of the administration of justice, we direct that the trial judge, on remand, address the significant issue raised by the pleadings, (but not by motion for summary judgment and, therefore not at issue in this appeal), i. e., is the publication defamatory or libelous? A negative response to the question concludes the controversy.

Assuming, but by no means suggesting, an affirmative response, the trial court would proceed to try the sole remaining issues of (a) the truth of the publication and (b) if untrue, whether it was made with actual malice as defined in *New York Times v. Sullivan, supra.*

The judgment of the Court of Appeals is reversed; that of the trial judge affirmed; and the cause is remanded for further proceedings not inconsistent with this opinion.

FONES, COOPER and HARBISON, JJ., and OLIVER, Special Justice, concur.

William V. TRIGG, Plaintiff-Appellant,

v.

LAKEWAY PUBLISHERS, INC., d/b/a The Elk Valley Times, and Mrs. Dorothy Thompson, Defendants-Appellees.

Court of Appeals of Tennessee, Middle Section, at Nashville.

Aug. 1, 1986.

Application for Permission to Appeal Denied by Supreme Court Oct. 27, 1986.

Action was instituted to recover for publication of alleged defamatory petition in newspaper. The Circuit Court, Lincoln County, Thomas Boyers, IV, J., entered summary judgment for defendants, and plaintiff appealed. The Court of Appeals, Lewis, J., held that: (1) mere fact that newspaper did not contend that facts contained in petition published as an advertisement were true did not mean that newspaper had reasonable doubts as to falsity of those facts and, hence, did not add up to actual malice in publishing allegedly defamatory facts about a public figure, and (2) individual who drafted petition and caused it to be published in newspaper could not be held liable for alleged defamation contained in petition with respect to public figure in absence of evidence that she entertained serious doubts as to truth of those facts and was guilty of actual malice.

Affirmed and remanded.

Scott Daniel, Murfreesboro, for plaintiff-appellant.

James H. Henry, II, Henry & McCord, Tullahoma, for defendant-appellee, Lakeway Publishers, Inc.

Robert W. Stevens, Stevens, Bagley & Stevens, Fayetteville, for defendant-appellee, Mrs. Dorothy Thompson.

OPINION

LEWIS, Judge.

Plaintiff William V. Trigg filed his complaint against defendants, Lakeway Publishers, Inc., d/b/a The Elk Valley Times (Times), and Mrs. Dorothy Thompson (Thompson), and alleged that the defendants published or caused to be published "certain false, scandalous, defamatory and malicious writings" about him.

Each defendant answered, denying all material allegations of the complaint, and thereafter, following the taking and filing of certain depositions and affidavits, moved for summary judgment.

Thereafter, the trial court, upon consideration of the entire record, found that plaintiff was a "public figure" and that he had "failed to establish with admissible evidence in a clear and convincing way that defendants acted with actual malice and, therefore, defendants are each entitled to a summary judgment."

Following the entry of the order sustaining each of the defendant's motion for summary judgment and the dismissal of his complaint, plaintiff appealed.

The facts pertinent to our inquiry are as follows:

Plaintiff was a member, chairman, and spokesman for a group of citizens of Lincoln County who styled themselves "Citizens for Tax Reform" and who were, according to plaintiff, interested in the governmental affairs of Lincoln County.

Plaintiff and other members of his group held public meetings in various locations in Lincoln County. They met with Leonard Mansfield, County Judge of Lincoln County, and with various members of the Lincoln County Commission, the budget committee in particular, on several occasions.

In either 1980 or 1981, the Lincoln County Road Superintendent had been ousted from office. Prior to leaving office the Superintendent had presented blank checks to Judge Mansfield for his signature. Judge Mansfield signed the blank checks which were later made payable to the attorneys who had represented the Road Superintendent in his ouster suit. Plaintiff or members of his group or both subsequently learned that county road funds had been used to pay the Road Superintendent's attorney's fees. Plaintiff and some members of the group met on November 12th with Judge Mansfield, eleven members of the County Commission, the County Attorney, and others and demanded Judge Mansfield's resignation within one week or threatened to file an ouster suit.[1] Plaintiff was the only spokesman for his group at the November 12th meeting in which the ultimatum was

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[1] The Attorney General for the State of Tennessee had rendered an opinion prior to that meeting that Judge Mansfield was a county judge and, under the Tennessee Constitution, was not subject to ouster.

delivered. Subsequent to this meeting, defendant Thompson caused the following petition to be drafted and circulated:

> THE RESPONSIBLE CITIZENS SPEAK
>
> We, the undersigned citizens and taxpayers of Lincoln County, do hereby announce our support and confidence in the Honorable Leonard Mansfield, County Judge, and the other public officials of our county.
>
> We deeply resent and abhor the attempt by a tiny group of persons who have made reckless, irresponsible and slanderous charges against him and our other county officials with total disregard for the truth.

The petition was drafted by a Fayetteville attorney, Fred Womack, on Saturday, prior to the Thursday, November 19, 1981 edition of the *Times*. Between the time of the drafting of the petition and Thursday, November 19, 1981, Mrs. Thompson and others obtained some 636 signatures on the petition.

The petition was taken to the *Times* by Thompson and was run in the *Times* as a paid advertisement on pages 6B and 7B of the November 19, 1981 edition. At the time she took the petition to the *Times*, she had no discussion with anyone except as relating to the cost of publication of the petition.

Subsequent to the petition being taken to the *Times*, Jimmy Simms, the *Times'* government reporter, talked with Mrs. Thompson in order to secure background for a possible news story. After talking with Thompson, Simms

contacted plaintiff. Simms stated that he contacted plaintiff because plaintiff had been the spokesman for a group opposing Judge Mansfield. After talking with both plaintiff and Thompson, Simms wrote an article which was placed on the front page of the November 19th edition and quoted both Thompson and plaintiff extensively. The article also referred to the petition.

Plaintiff insists that the petition was directed at him and his group, and that the accompanying front-page article specifically referred to plaintiff, identifying him with the "aforesaid reckless, irresponsible and slanderous charges against Judge Mansfield and other county officials." He also alleged that "all the charges were false and known by the defendants to be false and that they were made against plaintiff with reckless disregard for the truth and did in fact result in damage to his occupation and reputation."

The record shows that although plaintiff had a good relationship with the *Times* and that he visited the *Times* after the article was published, he did not ask for a retraction or make any comment whatsoever that he was dissatisfied. He did request a retraction, through his attorney, approximately one year after publication and shortly before filing the instant suit.

On December 1, 1981, plaintiff and other members of his citizens group filed suit against Judge Mansfield, the former County Road Superintendent, and their bonding companies in an effort to obtain repayment of the superintendent's legal fees funded by the County in connection with the Superintendent's ouster suit.

Plaintiff correctly contends that summary judgment is not available where a genuine issue of fact exists.

In determining whether or not a genuine issue of fact exists in a summary judgment case, the trial court and this Court on appeal must look at all the evidence, take the strongest legitimate view of it in favor of the opponent of the motion and allow all reasonable inferences from it in his favor, discard all countervailing evidence, and if then there is any dispute as to any material determinative evidence or any doubt as to the conclusion to be drawn from the whole evidence, the motion must be denied. *See Phillips v. Pittsburgh Consolidated Coal Co.*, 541 S.W.2d 411, 413 (Tenn.1976); Tenn.R.Civ.P. 56.03. He argues that genuine issues exist as to whether he is a public or private figure and that even if he were held to be a public figure, a genuine issue exists regarding the existence of actual malice.

The Tennessee Supreme Court, in *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn.1978), adopted standards 580A and 580B, *Restatement (Second) of Torts* (1977), which read as follows:

> § 580A. *Defamation of Public Official or Public Figure.* One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he
>
> (a) knows that the statement is false and that it defames the other person, or
>
> (b) acts in reckless disregard of these matters.

> § 580B. *Defamation of Private Person.* One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he
>
> (a) knows that the statement is false and that it defames the other,
>
> (b) acts in reckless disregard of these matters, or
>
> (c) acts negligently in failing to ascertain them.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964), the Court stated:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 87 S.Ct. 1975, 1991, 18 L.Ed.2d 1094, 1111 (1967), the rule was extended to defamation of "public figures" who were involved in "public issues." The Court determined that a public figure is one who "may have attained that status by position alone . . . [or] by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy, but . . . commanded sufficient continuing public interest and had

sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements." *Id.*

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court further defined a public figure, as follows:

> For the most part those who attain this status have assumed roles of an especial prominence in the affairs of society. Some occupy positions of such persuasic power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

418 U.S. at 345, 94 S.Ct. at 3009, 41 L.Ed.2d at 808.

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

418 U.S. at 351, 94 S.Ct. at 3013, 41 L.Ed.2d at 812.

In *Cloyd v. Press, Inc.*, 629 S.W.2d 24, 25-26 (Tenn.App.1981), this Court, in reaching a determination of whether plaintiff was a public figure, stated:

> [D]oes a public controversy exist, and what is the nature and extent of the individual's participation in that controversy. The nature and extent of the individual's participation is determined by looking to three factors: the extent to which participation in the controversy is voluntary, the extent to which there is access to channels of effective communication in order to counteract false statements, and the prominence of the role played in the public controversy.

If plaintiff is a public figure, he may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.

The Court of Appeals for the Sixth Circuit has stated:

> *Gertz* provides general guidelines to assist the media and the courts in determining whether an individual is a public figure: does a public controversy exist, and what is the nature and extent of the individual's participation in that controversy. The nature and extent of the individual's participation is determined by looking to three factors: the extent to which participation in the controversy is voluntary, the extent to which there is access to channels of effective communication or order to counteract false statements, and the prominence of the role played in the public controversy.

Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371, 374 (6th Cir.1981) (quoted with approval in *Cloyd v. Press, Inc.*, 629 S.W.2d 24, 25-26 (Tenn.App.1981)).

In 1980, plaintiff and a group of other Lincoln County citizens formed "Citizens for Tax Reform." Public meetings were held throughout the County by "Citizens for Tax Reform." These meetings were advertised in the newspaper and members of the Lincoln County Commission were specifically invited to the meetings. Plaintiff was elected chairman of "Citizens for Tax Reform" and was its chief spokesman.

As spokesman and chairman of "Citizens for Tax Reform," plaintiff contacted Judge Mansfield asking him to correlate the construction projects performed in Lincoln County with a list of convicted bidriggers, and plaintiff and several members of his group met with Judge Mansfield to discuss the project. Plaintiff was the chief spokesman at these meetings.

Members of the group attended various county commission meetings and formed a complementary county government whereby certain members of plaintiff's group, including plaintiff, selected particular county government officials and "shadowed" those officials. The members selected would attend meetings and follow their governmental counterparts.

In November, 1981, plaintiff and other members of his group met with Judge Mansfield, eleven members of the County Commission, the County Attorney, and others. At this meeting, plaintiff was the only spokesman and called on Judge Mansfield to either resign or threatened that a suit would be filed to oust him as a result of his (Judge Mansfield's) participation in the signing of blank checks for the payment of the Road Superintendent's legal fees.

Prior to the November 1981 meeting, plaintiff had been quoted extensively in the *Times* as spokesman for the taxpayers group. He had also been quoted in Nashville, Tennessee, and Huntsville, Alabama, newspapers.

Prior to the publication of the petition and news story on November 19, 1981, plaintiff would bring information to the *Times* office regarding his activities on behalf of the citizens group. This included taped conversations he had had with Judge Mansfield.

The record is clear that due to his activities plaintiff was well known in dealing with governmental affairs by those with whom he had associated and by anyone who read the newspapers. He had received extensive coverage in the newspapers prior to the publication of the petition.

There is no question that a public controversy existed, that plaintiff injected himself into the public controversy, and that his extensive participation brought about much of the controversy.

There is no genuine issue of fact regarding whether plaintiff was a public figure. The trial court correctly found that he was in this instance a public figure.

Plaintiff also contends that summary judgment was inappropriate even if he was a public figure because there is a genuine issue of fact of whether the *Times* and Thompson were guilty of "actual malice."

> . . . *New York Times Co. v. Sullivan* [376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)] makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the

> *Times* test of actual knowledge or reckless disregard of the truth [and] [u]nless the court finds, on the basis of pretrial affidavits, depositions, or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment.

Wright, J., concurring, *Wasserman v. Time, Inc.*, 424 F.2d 920, 922 (D.C.Cir.), *cert. denied*, 398 U.S. 940, 90 S.Ct. 1844, 26 L.Ed.2d 273 (1970).

"[A] public figure cannot resist a newspaper's motion for summary judgment under Rule 56 by arguing that there is an issue for the jury as to malice unless he makes some showing, of the kind contemplated by the Rules, of facts from which malice may be inferred." *Thompson v. Evening Star Newspaper Co.*, 394 F.2d 774, 776 (D.C.Cir.1968).

Whether there is "actual malice" is a proper question to be decided on motion for a summary judgment.

On motion for summary judgment where plaintiff, as in this case, is a "public figure," it is incumbent upon him to show "actual malice" with "convincing clarity." *See New York Times Co. v. Sullivan*, 376 U.S. at 285-286, 84 S.Ct. at 729, 11 L.Ed.2d at 710.

While not conclusive, plaintiff stated in his deposition that the *Times* had no "malice or ill will toward" him. He also testified that he did not feel that Jimmy Simms, who wrote the article, "meant to do me harm. . . . "

The evidence is that the *Times* had nothing to do with the petition other than publishing it as a paid advertisement. It is uncontradicted that neither the publisher nor Simms had any knowledge of any false statements in the

petition. The *Times* simply accepted and published the petition for a fee. To prepare for the accompanying news story on a matter of interest to the citizens of Lincoln County, Mr. Simms contacted Thompson, who informed him that she and the signors of the petition simply wanted to support Judge Mansfield.

Nothing in the news article adopts the statements in the petition as the newspaper's own. In fact, the news article identifies the petition as an advertisement.

In preparing the news article, Mr. Simms contacted plaintiff because plaintiff had been in the forefront of the controversy with Judge Mansfield and had been quoted in this regard in two previous editions of the paper. Plaintiff finds no fault with the newspaper article itself and admits that the quotes attributed to him are correct.

It is his insistence that the petition is inaccurate and that the *Times* was negligent in its failure to check the accuracy of the petition.

> Negligent failure to check the accuracy of statements in an advertisement and to discover misstatements therein, "is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." Otherwise stated, investigatory failures alone are insufficient to show recklessness on the part of a newspaper.

Baldine v. Sharon Herald Co., 391 F.2d 703, 706 (3rd Cir.1968) (citation omitted).

> These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that

> the defendant in fact entertained serious doubts as to the truth of his publication.

St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262, 267 (1968). This same standard has been adopted by this Court in *Taylor v. Nashville Banner Publishing Co.*, 573 S.W.2d 476, 482 (Tenn.App.1978), *cert. denied*, 441 U.S. 923, 99 S.Ct. 2032, 60 L.Ed.2d 396 (1979).

The affidavits and depositions of Mr. Simms and the *Times'* publisher, Elvis Gold, established a lack of recklessness. These affidavits and depositions are not controverted by facts but only by conclusions of the plaintiff.

Plaintiff relies upon a statement of Mr. Simms that he would not personally contend that any of the statements made by plaintiff or any of the group were reckless, irresponsible and slanderous. Plaintiff then attempts to transform this into the statement that the *Times* "did not even believe [the allegations] to be true themselves." A full reading of the record does not support plaintiff's argument. Mr. Simms states in his deposition that to his knowledge no one at the *Times* ever contended that plaintiff had made slanderous charges against Judge Mansfield with a total disregard for the truth.

It does not follow that the mere fact that a newspaper does not contend that the facts contained in an advertisement are true, means that they have reasonable doubts that they are false. The burden is upon plaintiff to show with "convincing clarity" the facts which make up the "actual malice."

Mrs. Thompson is entitled to the same First Amendment protection as the media defendant. *See St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262

(1968), and the plaintiff must likewise prove as to Mrs. Thompson by clear and convincing proof that she is guilty of "actual malice." *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984).

Mrs. Thompson was a lifelong friend of Judge Mansfield. She had gone to school with Judge Mansfield many years before he became County Judge. She testified that she had high respect for him and was a supporter of his, that there had been much publicity in the press of charges critical of Judge Mansfield and a demand that he either resign or face an ouster suit, and that she, along with others, circulated the petition and caused it to be published for the sole purpose of showing support for Judge Mansfield, and that she bore no malice or ill will toward plaintiff.

Plaintiff relies upon *Moore v. Bailey*, 628 S.W.2d 431 (Tenn.App.1981), in an attempt to show that Mrs. Thompson was guilty of "actual malice." The facts in *Moore v. Bailey* and the facts here are inapposite. In *Moore v. Bailey*, the defendant expressed doubts as to whether the published statements were true. Here, Mrs. Thompson testified that she believed the publication was true, although she did state that she did not have personal knowledge of the truth of the publication. She also admitted that the person who "made the charge" against Judge Mansfield might have felt that it was true.

However, that is not the standard. Plaintiff must show that "a false publication was made with a high degree of awareness of . . . probable falsity. . . . There must be sufficient evidence to permit the conclusion that

the defendant in fact entertained serious doubts as to the truth of his publication. . . . Failure to investigate does not in itself establish bad faith." *St. Amant v. Thompson*, 390 U.S. at 731-733, 88 S.Ct. at 1325-1326, 20 L.Ed.2d at 267-268.

The record in this case fully supports the trial court's action in sustaining the motion for summary judgment and dismissing plaintiff's complaint. Plaintiff is clearly a public figure and he has failed to show "actual malice" on the part of either defendant.

The judgment of the trial court is affirmed and the cause remanded to the trial court for the collection of costs which are assessed against the plaintiff, and for any further necessary proceedings.

TODD, P.J. (M.S.), and CANTRELL, J., concur.